(33,910)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 601

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANTS,

vs.

GAMBLE LATROBE, JR., JAMES P. KNOWLES, AND WILLIAM S. ERICHS, TRUSTEES, ETC.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN UNITED STATES DISTRICT COURT, DISTRICT OF DELAWARE

No. 579. In Bankruptcy

In the Matter of THERMIODYNE RADIO CORPORATION, Bankrupt

In the Matter of the Petition of the PEOPLE OF THE STATE OF NEW YORK, Claimant, to Review the Order of the Referee Disallowing the Claim of the State of New York for $15,000.00 License Tax

NOTICE OF APPEAL

SIR: Please take notice that the People of the State of New York hereby appeal from the order made herein on the 23 day of May, 1928, affirming the order of the referee in bankruptcy, disallowing, rejecting and expunging the [fol. 2] said claim from the list of claims upon the records in the above stated cause and dismissing the petition to review said order filed by the petitioner, the People of the State of New York.

Dated June 9, 1928.

Yours, etc., Albert Ottinger, Attorney-General of the State of New York, Attorney for Petitioner-Appellant, the People of the State of New York. Office and Post Office address: Capitol, Albany, New York.

To Ralph Montgomery Arkush, Esq., attorney for trustees in bankruptcy, No. 15 Broad Street, New York City.

[fol. 3] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL

To the Honorable Judges of the United States District Court for the District of Delaware:

Your Petitioner, the People of the State of New York, conceiving itself aggrieved by the certain Order entered on

the 23 day of May, 1928, in the above entitled proceeding, affirming the Order of the Referee in bankruptcy herein, rejecting, disallowing and expunging the claim of the Petitioner, the People of the State of New York, for license tax amounting to $15,000.00 from the list of claims upon [fol. 4] the record in the above stated cause, directing that the petition for the review of said Referee's Order, heretofore filed in this Court on behalf of the said petitioner, the People of the State of New York, be dismissed, hereby petition for an appeal from the said Order to the United States Circuit Court of Appeals for the Third Circuit, and prays that its appeal may be allowed and that a citation may be granted, directed to the trustee herein, demanding them to appear before the United States Circuit Court of Appeals for the Third Circuit, to do and receive that which may appertain to justice to be done in the premises, and that a transcript of the record and evidence in said cause, duly authenticated, may be transmitted to the said United States Circuit Court of Appeals for the Third Circuit; and in connection with this petition, the said petitioner, the People of the State of New York, herewith presents its Assignment of Errors.

Dated June 5, 1928.

(Sgd.) Albert Ottinger, Attorney-General of the State of New York, Attorney for Petitioner, the People of the State of New York. Office & Post Office address: Capitol, Albany, New York.

[fol. 5] IN UNITED STATES DISTRICT COURT

ALLOWANCE OF APPEAL

And now, to wit, this eighth day of June, A. D. 1928, upon reading and considering the foregoing petition, it is, upon motion of Albert Ottinger, Esq., attorney for appellant,

Ordered by the Court that the foregoing appeal be and hereby is allowed, and the Trustees of said bankrupt, by James I. Boyce, Esq., their attorney, waiving the giving of bond for costs by appellant, no order as to bond is made.

(Sgd.) Hugh M. Morris, J.

[fol. 6] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR

Now comes the People of the State of New York, petitioner-appellant, and files this, its Assignment of Errors, and in connection with its petiton for appeal say that in the record of proceedings and in an order made and entered herein on the 23 day of May, 1928, manifest error hath intervened to the prejudice of the appellants, to wit:

1. That the Court erred in affirming the order of the Referee in bankruptcy, disallowing the claim for license fee [fol. 7] or tax of the people of the State of New York in the sum of $15,000.00 and dismissing the petition for a review of said order by said Referee filed by the said petitioner, the People of the State of New York, in that the Court in making said Order held that Section 181 of the Tax Law of the State of New York, providing for the assessment of 6¢ a share on stock of no par value, was a statutory enactment in violation of the equal protection clause of the 14th Amendment of the Constitution of the United States, and was unconstitutional, whereas in law and in fact said statutory enactment providing for a license fee payable by foreign corporation seeking to do business in the State of New York was a constitutional exercise of the taxing power of the State of New York and in none of its terms and conditions violated any of the provisions of the 14th Amendment of the Constitution of the United States.

2. That the Court erred in making the order complained of and holding that § 181 of the Tax Law of the State of New York, relating to the method of assessment of the amount of license fee upon the stock of a corporation having no par value, was unconstitutional, whereas said statute was a constitutional exercise of the power of the Legislature of the State of New York in determining the amount to be paid as license fee by a foreign corporation as a condition for permission to do business within the territorial jurisdiction of the State of New York; that the State of

New York possessed the absolute power of exclusion of foreign corporations, and had the absolute right to fix and [fol. 8] determine any tax or license fee as a condition for granting that which it arbitrarily withholds.

3. That the Court erred in making the order complained of and holding that § 181 of the Tax Law of the State of New York violated the equal protection clause of the 14th Amendment of the Constitution of the United States and was unconstitutional by reason thereof, whereas in law and in fact the provisions of § 181 of the Tax Law of the State of New York applied in equal degree to all foreign corporations seeking to do business in the State of New York, and operated equally and in like manner on all corporations falling within the particular classification of foreign corporations.

4. That the Court erred in making the order complained of and holding that the Legislature of the State of New York, in assessing the license fee or tax of 6¢ on each share of stock of no par value employed in said State, acted in an arbitrary and unconstitutional manner, whereas the legislative enactment upon which the claim of the State of New York for license fee rests was a reasonable exercise of the legislative discretion in placing foreign corporations doing business in the State of New York on equal terms with domestic corporations organized and doing business in the said State, and the provisions of § 181 of the Tax Law of the State of New York was designed to prevent foreign corporations from doing business to the disadvantage of domestic corporations deriving their proper rights and privileges from the State of New York.

[fol. 9] 5. The Court erred in making the order complained of in entertaining the defense of the unconstitutionality of § 181 of the Tax Law of the State of New York, relating to the assessment of a license fee on the stock of a foreign corporation having no par value, in that the Thermiodyne Radio Corporation, the bankrupt in this proceeding, applied for and received the right to do business in the State of New York upon the undertaking that, when the lapse of the statutory period made possible the determination of the proportion of its capitalization employed in business in the State of New York, it would pay the amount

of license fee as then calculable, the amount thereof relating back to the date of receiving the privilege applied for from the State of New York; that the bankrupt corporation herein has availed itself of and enjoyed the privileges and rights conferred by the State of New York in the issued permission to do business within the said State, and that said corporation was and is, and that the trustees and receiver of said corporation, standing in its place, were and are, estopped and precluded from asserting the unconstitutionality of the Statute relating to assessment of the license fee.

6. That the Court erred in making the order complained of and holding that the valuation of stock of no par value was determinable by the value of assets of the corporation used by it in the transaction of business in the State of New York during the period of one year subsequent to the issuance of the license to transact business in the State of New York; whereas in law and in fact the license fee ex-[fol. 10] acted by the State of New York under Section 181 of the Tax Law of said State of New York was for the admission of the corporation to the State of New York for the transaction of its business therein and was not dependent upon any business actually transacted or any assets except as the amount of said assets are necessary to be determined to insure a proper segregation of the stock of said corporation so as to determine the proportion thereof employed in the State of New York and thus further to determine the amount that the corporation should pay, in accordance with its stipulated agreement for the license issued to it to transact business in the State of New York.

7. The Court erred in making the order complained of in entertaining any defense to the method of assessment of the license fee herein on the ground that the Thermiodyne Radio Corporation, the bankrupt corporation, had a right or remedy of review of the assessment of said license fee before the State Tax Commission of the State of New York, and through certiorari to the Supreme Court of the State of New York under § 199 of the Tax Law of the State of New York, which remedy of adjustment or review has not been taken by either the corporation or the receiver or trustees in this proceeding, and that, in the absence of ex-

hausting such remedy, neither the referee nor the United States District Court for the District of Delaware had any jurisdiction to review the finality of the assessment as made by the State Tax Commission of the State of New York.

[fol. 11] Wherefore the Appellants pray that the order of the United States District Court for the District of Delaware, affirming the order of the referee, disallowing the claim of the State of New York for $15,000 license tax and dismissing the petition to review said order of the referee, heretofore filed in this Court, be reversed with costs, and that the cause be remitted to the United States District Court, District of Delaware, for such further proceedings as may be in conformity with justice and equity.

Dated: June 5, 1928.

(Sgd.) Albert Ottinger, Attorney-General of the State of New York, Attorney for Appellants, The People of the State of New York. Office & Post Office address: Capitol, Albany, New York.

A true copy. Attest: H. C. Mahaffy, Jr., Clerk. (Seal.)

[fols. 12 & 13] Citation, in usual form, showing service on James I. Boyce, omitted in printing.

[fol. 14] In United States District Court

Proof of Claim

Notice of Assessment and Receipt.

State Tax Department, Albany, N. Y.

Date: Dec. 21, 1926.
Refer to File No. A, 446683.

Thermioslyne Radio Corp., c/o John Biggs, Jr., ref., Equitable Bldg., Wilmington, Del.

Notice is hereby given that there has been assessed against you the amount set below as a license fee. It is now payable.

Certified Checks, Money Orders or Bank Drafts should be payable to and forwarded to State Tax Commission, Albany, N. Y., with this form.

Foreign license fee under § 181 of the tax law.

Uncertified checks not accepted.

For License for the privilege of exercising its corporate franchise or carrying on business based on amount of Capital Stock or number of shares employed in New York State, per Section 181 of the Tax Law.

This notice must be returned at the time payment is tendered, as when properly signed it becomes a receipt.

Number of shares, no par value, 250,000; tax 6c. per share, $15,000.00.

[fol. 15] Please take notice that annexed hereto is a statement of franchise taxes due the State of New York and for which the State of New York claims a preference over and above all the debts of the bankrupt and claims submitted to you and demands that said amount be forthwith paid by you in full out of any moneys now in or which may hereafter come into your possession.

Dated December 21, 1926.

Albert Ottinger, Attorney General of the State of New York. Office and P. O. address: Capitol, Albany, N. Y.

United States District Court, District of New York

In Bankruptcy. No. —

In the Matter of Thermiodyne Radio Corp., Bankrupt

Claim of the State of New York for Taxes

Amount $15,000.00 plus accrued interest.

Priority and lien claimed.

Albert Ottinger, Attorney-General, Attorney for claimant. Office and P. O. address: Capitol, Albany, N. Y.

[fol. 16] IN UNITED STATES DISTRICT COURT

[Title omitted]

REFEREE'S NOTICE OF OBJECTION TO CLAIM

Claim No. 116

To State Tax Department, Albany, New York, and Albert Ottinger, Esq., Albany, New York, its attorney:

You will Please Take Notice that the Trustees herein have filed a petition asking that your claim against the above-named bankrupt be reexamined and rejected for the reasons set forth in the said petition, of which a copy is hereto attached, and that a hearing will be had on such petition at the office of the undersigned, No. 510 Equitable Building, Wilmington, Delaware, on the 30th day of September, A. D. 1927, at two o'clock P. M.

Dated, September 12th, 1927.

John Biggs, Jr., Referee in Bankruptcy.

[fol. 17] IN UNITED STATES DISTRICT COURT

[Title omitted]

TRUSTEE'S PETITION FOR REJECTION OF CLAIM

To John Biggs, Jr., referee in bankruptcy:

Your petitioners respectfully show:

(1) That they are the Trustees herein.

(2) That the proof of debt of State of New York claiming to be a creditor of the said Thermiodyne Radio Corporation was filed herein on the Eighth day of January, A. D. 1927, and on the same day duly allowed.

(3) That the same should not have been allowed for the following reasons:

For that, the said Thermiodyne Radio Corporation is not indebted to the State of New York for any license fee in the sum of $15,000 or in any other sum whatsoever.

For that the said alleged claim is not entitled to any priority whatsoever.

[fol. 18] (4) That the attorney for the said claimant is Albert Ottinger, Esq., Attorney General, Albany, New York.

(5) That no previous application has been made to this or any other Court for the order hereinafter asked.

Wherefore, your petitioners pray that the said proof of debt may be reconsidered and rejected.

Gamble Latrobe, Jr., James B. Knowles, William S. Erichs, Trustees, by Gamble Latrobe, Jr. James I. Boyce, Attorney for Trustees.

Duly sworn to by Gamble Latrobe, Jr. Jurat omitted in printing.

[fol. 19] And now, to wit, this 12th day of September, A. D. 1927, upon reading and filing the petition of the Trustees herein praying for a re-examination of the claim of State of New York, Albany, New York, and upon motion of James I. Boyce, Esq., attorney for the Trustees,

It is ordered that such re-examination be had and that the hearing thereon be fixed for the 30th day of September, A. D. 1927, at two o'clock P. M. at the office of the Referee, No. 510 Equitable Building, Wilmington, Delaware.

John Biggs, Jr., Referee in Bankruptcy.

[fol. 20] In United States District Court

Claims 108 and 116—New York State Tax Department

In re Thermiodyne Radio Corporation

Minutes of Hearing Before Referee

Before John Biggs, Jr., Esq., Referee

Wilmington, Delaware,

Friday, September 30, 1927—at 2 o'clock p. m.

Appearances of Counsel

Ralph M. Arkush, Esq., New York City.

James L. Boyce, Esq., Wilmington, for the Trustees.

Appearance:

Albert Ottinger, Esq., Attorney-General of the State of New York, by

William Matthews, Esq., Deputy Assistant Attorney General, for the Claimant, Department of Taxation and Finance of the State of New York.

CHARLES W. HUTCHINS was called as a witness on behalf of the claimant and, being duly sworn, testified as follows:

Direct examination by Mr. Matthews:

I reside at Rockaway Beach, N. Y. I am license clerk in the Department of Taxation and Finance of the State of New York.

Referring to the claim for license fee in the sum of $15,000 (Claim No. 116 in this proceeding) this license fee was assessed on the basis of a report filed by the bankrupt [fol. 21] corporation, the 1925 franchise tax report filed in the office of the Department of Taxation and Finance June 12th, 1925, as shown by the stamp on the face.

Report produced, offered in evidence and marked "State of New York, Tax Department, Exhibit No. 1."

The report indicates that this corporation began business in New York in November, 1924; that it had issued capital stock outstanding to the number of 250,000 shares of no par value. The tax was computed at the rate of six cents per share as provided by Section 181 of Article 9 of the Tax Law. The report further indicated that all of this corporation's capital was employed in New York, and that it had a place of business at Plattsburg, New York, and maintained no place of business where the corporation maintained any permanent store, warehouse, factory or other place to continue its business outside of the State of New York. No part of this license fee has been paid. This is the only report this corporation has ever filed.

Cross-examination by Mr. Boyce:

The Department of Taxation and Finance made no efforts to determine the actual value of the assets of the corporation. The tax assessed had no relation to the actual value of the assets. The so-called license fee or tax was assessed at the rate of six cents per share on each share of no par value stock regardless of the value of the assets of the cor- [fol. 22] poration. The elements which entered into the

calculation were the number of shares, the rate per share, and the location of the gross assets of the corporation and where employed and doing business. In this case all the assets were in New York State.

By the Referee:

The $15,000 tax is based on a report indicating the rate per share in relation to the portion of gross assets employed in New York State. The franchise tax is based upon the outstanding capital stock of no stated par value which is apportioned for taxation purposes in accordance with the proportionate amount of assets employed in New York State. They are both on the same basis in determining the percentage of capital taxable in New York State.

By Mr. Boyce:

The license fee or tax was assessed under Section 181 of Article 9 of the New York State Tax Law, amended by Chapter 332, Laws 1924, under the provision, "On the issued capital stock of any corporation issuing shares without designated monetary value, such corporation shall pay for the use of the State, a license fee of six cents on such shares employed in this State," and other provisions of the same section.

Redirect examination by Mr. Matthews:

The license fee was assessed December 21st, 1926.

[fol. 23] J. Eugene Meyer, called as a witness on behalf of the trustees and being duly sworn, testified as follows:

By Mr. Arkush:

I was comptroller of the bankrupt corporation, and was, in that capacity, familiar with the books and accounts of the bankrupt. I have seen State Tax Exhibit No. 1. I have seen the question therein "The average price at which this corporation sold stock during the year, high and low, high is 22 1/2 and low 6 1/2." At the high price of 22 1/2 and the number of issued shares as shown by the report

of 250,000, that would give a valuation of $5,625,000 to the net assets of the company, and, at the low price of 6 1/2, a valuation of $1,625,000. The high figure mentioned had no relation to the actual net value of the assets of the corporation. Since commencing business in New York State, the corporation never operated at a profit, but at a loss. It carried its patents and good will at approximately the figure of $1,379,000. I have no knowledge whether these patents were ever sold by the corporation or the trustee in bankruptcy. I personally made an effort to procure a purchaser for these patents but was unsuccessful.

On or about November 19th, 1925, the actual book value of the assets of the corporation exceeded its liabilities. The actual value did not exceed the amount of liabilities. The book value was about $900,000 in excess of liabilities. At that time the patents and good will were carried in excess of $1,000,000. I do not think that the figures for ac- [fol. 24] counts receivable reflect the true value of these accounts. I have checked the actual receivable value of the accounts receivable, and find a shrinkage from approximately that date of between $100,000 and $150,000. And the inventory at that date was carried on its cost value. That cost value, upon conversion of the inventory into cash, showed a shrinkage of over 26 per cent. The real estate and machinery and other fixed assets were carried at cost with adequate depreciation, which valuation showed a shrinkage.

Q. Approximately how much?

The Referee: Mr. Arkush, that certainly is immaterial.

Mr. Arkush: If your Honor please, the law states——

Mr. Matthews: I have a blanket objection, as I understand it, to all this.

Mr. Arkush: That is understood.

The Referee: But your question is directed to the shrinkage of the tangible assets of the corporation at the time they were sold, which was long after the period at which this tax was assessed. In other words, the witness, in answering this question now would not in any degree indicate what was the value of a plant after depreciation in 1924.

[fol. 25] Mr. Arkush: I do not think as practice goes one year is very high—a long time.

The Referee: I think on machinery of the sort that this company had there would certainly have to be evidence to connect it with what it was in 1924.

Mr. Arkush: That goes to the probative effect of it.

The Referee: There is nothing before me that would permit me to make such a finding. I think that is immaterial.

Of the 250,000 shares referred to in the report, there was somewhere in the neighborhood of 196,000 shares put in escrow, deposited at different banks and to be realized only by a cooperative arrangement. That stock had been issued for patents of the company and did not represent cash investment. H. D. Williams & Company was the brokerage or banking house connected with the floating of the stock. The bankrupt had offices at Chicago and San Francisco. It took orders for delivery outside of the State of New York, and shipped its goods outside—of the State of New York.

For the shares that were issued for cash, there was received about seven and a quarter dollars per share. The company never received any assets other than the cash it received from its stock and what it bought with that cash, and the patents that were received for the balance of the stock.

[fol. 26] State Tax Exhibit 1

Form Set 4-9-25-300,000 (26-5466)

Every Corporation Incorporated Prior to Nov. 1, 1925, Must Report

Franchise Tax on Business Corporations

Every Corporation Incorporated Prior to July 1, 1925, Must Make This Report to State Tax Department, Albany, N. Y.

This report is Due July 1, 1925. Corporations filing reports with the United States Treasury Department after June 1, 1925, for a fiscal year ending before July 1, 1925,

must file this report within thirty days after such filing and give date of filing federal report.

The report must cover the conditions and the entire net income for the corporation's last fiscal year ending on or before June 30, 1925.

New Corporations see special instructions at bottom of page three (3).

Name of corporation (exact corporate title): Thermiodyne Radio Corporation.

Mail address: 1819 Broadway, New York City.

(Full details for delivery of blanks and notices of assessment must appear above.)

I make the following report of such company for the year ending December 31, 1924, or the fiscal year ending —— —, ——, pursuant to Article 9-A of the Tax Law.

(Date inserted above must be the same as given in the answer to (8) below.)

[fol. 27] (1) Organized Oct., 1924, under the Laws of Delaware.

(2) Began business in New York Nov., 1924.

(3) If not incorporated under the laws of New York, has it been legally authorized to do business in New York State? Yes.

(4) Authorized capital stock, $——.

(5) Amount of average indebtedness for year, $——. (Exclusive of capital stock.)

Answers to item 6 below must be as of June 30, 1925. Par value per share, ——. Total par value, ——. Dividends paid, ——.

(6) Number of shares, Common, issued: ——. $——. $——. $——. Number of shares, Preferred, issued: ——. $——. $——. $——. Number of shares without par value, issued: 250,000; amount paid in on same, $580,000; $none; total issued, $580,000.

Any capital stock issued or subscribed after June 30, 1928, and prior to November 1, 1925, must be reported to the State Tax Department, Corporation Bureau, within 30 days.

(7) If your fiscal year has been changed since July 1, 1923, how? ——.

(8) Entire net income for the year ending December 31, 1924, or the Fiscal Year (Period) Commencing —— —,

——, and Ending —— ——, ——, as shown by its report to the United States Treasury Department, $——. No report made to Federal Government.

[fol. 28] (NOTE.—The above answer must be based on the last report filed with the Federal Government for a period ending between July 1, 1924, and June 30, 1925, inclusive.)

(9) Dividends received from corporations not included in (8), $——.

(10) State amount of interest received from Federal, state, municipal, or other obligations, not included in item (8). $——.

(11) Total Gross Income reported at item 11 on Federal Income Tax Return for the above period, $——.

(11-a) Deductions (as shown on federal report):

(a) Compensation of officers	$
(b) Rent on business property	
(c) Repairs	
(d) Interest	
(e) Taxes (Item 16 Fed. Rpt.)	
(f) Losses by fire, storm	
(g) Bad debts	
(h) Depreciation	
(j) Depletion	
(k) Other deductions not shown above must be shown in detail on sheet attached	
Total Deductions shown above	$
Item 11 above less item 11-a above	

(12) If the entire net income as first returned was changed by the Federal Government, state the amount of such entire net income as finally determined for the year ending:

—— ——, 1916	$
—— ——, 1917	
—— ——, 1918	

[fol. 29]

—— ——, 1919	$
—— ——, 1920	$
—— ——, 1921	$

—— —, 1922..... $....
—— —, 1923..... $....
(Insert Month and Day.)

(13) If a corporation is not organized under the laws of any state within the United States it should return its entire net income, wherever earned. $——.

(14) If the amount reported in (8) is inaccurate, state the amount claimed to be correct. $——.

(15) Nature of business and how transacted: Mfg. Radio Receivers.

(16) Place, street and number where business is conducted: 33-39 So. River St., Plattsburg, N. Y.

(17) State the city or town, street number and state where the company maintained any permanent store, warehouse, factory or other place of continuous business outside the State of New York during the year. None.

(18) Any corporation except one having stock without par value, may omit the segregation of assets on page 2 only by signing the following consent: I am authorized by the Board of Directors of this corporation to consent and I do hereby consent that said corporation be taxed upon its entire net income at 4½ per cent or upon its entire issued capital stock at one mill on the dollar, as provided by law.

(Do not sign consent unless taxable by the State of New
[fol. 30] York on entire income or entire issued capital stock.)

——.

(19) Does this corporation own a majority of the stock of another or other corporations? No. Give name of each and amount held. ——.

(20) Is a majority of the stock of this corporation owned by another corporation? No. If so, by what other? ——.

(This Report must be sworn to on page four.)
(All questions on this page must be answered.)
The notes on page three should be read carefully.

[fol. 31] Must be Answered

(21) Did this corporation file a consolidated report with the United States Treasury Department? No.

(21-a) If so, state amount of consolidated net income. $——.

(22) Were its income and assets included in the consolidated report of another corporation? No.

If so, name of corporation reporting the consolidated net income, —— ——, and amount of net income so reported. $——.

(23) Give the names and net income or loss attributable to each corporation, including the reporting corporation, included in the consolidated report, and specify whether gain or loss. ——.

(24) Has this corporation since January 1, 1917, either directly or indirectly, acquired by merger, consolidation or purchase, the major part of the assets or the franchise of any other corporation or corporations? [No.]*

Has it merger or consolidated any other corporation or corporations? [No.]*

If so, give name of each corporation and date of acquisition, merger or consolidation. —— ——.

(25) Has the entire net income of any corporation which has been acquired by, or merged or consolidated with this company been changed by the Federal Government, and not heretofore reported to the State Tax Department? (Answer yes or no) [No.]*

If changed, reduce such changes to affidavit form and file with this report.

[fol. 32] Segregation of Assets

(Must not include those of any other corporation.)

Read: The following segregations must be made by all corporations having stock without par value and all corporations which have not signed consent (18).

Total Segregated Assets Wherever Located

(a) Average total monthly value for the fiscal or calendar year of bills and accounts receivable arising from personal prop-

[*Word enclosed in brackets erased in copy.]

erty sold by the corporation from merchandise manufactured by it within and without this state	$150,000 00
(b) Average total monthly value for the fiscal or calendar year of bills and accounts receivable arising from the purchase, or sale of, or trading in, personal property, or from services performed by the corporation, its officers or agents, excluding those arising in any way from advances or loans	
†Average monthly value of all its real property wherever located (actual value)	60,000
†Average monthly value of all its tangible personal property wherever located (actual value)	20,000
†Average total actual value of shares of stocks [fol. 33] of other corporations owned by this corporation (notes, bonds, cash and evidences of debt must not be included). (Note: List of shares must be made on separate sheet and show corporate name, number of shares held, par value per share, actual value.)	
Total	$230,000.00

Does the segregation above made include assets of any subsidiary or other corporation? No.

Additional Information

To be used to determine fees under §181 of tax law and one mill tax

(1) Average monthly book and cash balance during the year	$50,000 00
(2) Average value of bills and accounts receivable during the year arising from advances or loans and not included above	
(3) Average value of bonds, loans on call and other financial securities wherever held, used or employed during the year (not including shares of stock)	

[fol. 34] Assets Segregated to New York State Only

(a) Average monthly value of bills and accounts receivable arising from personal property sold by the corporation from merchandise manufactured by it within this State	$150,000 00
(b) Average monthly value of bills and accounts receivable arising from personal property owned by the corporation and not manufactured by it within this State but sold by it or its agents and located within the State at the time of the receipt of the order	
(c) Average monthly value of bills and accounts receivable arising from the purchase or sale of, or trading in, goods, wares or merchandise not located at any place at which the corporation conducted a permanent or continuous business without the State and where the bills and accounts receivable arose from orders received or accepted by any officer or agent, or at any place of business, in this State	
(d) Average monthly value of bills and accounts receivable arising from services performed, by any officer, agent or representative of the corporation con- [fol. 35] nected with, sent from, or reporting, either directly or indirectly, to any officer located in this State or at any office located, owned, rented or occupied in this State	
†Average monthly value of its real property within this State as detailed in this report (actual value)	60,000
†Average monthly value of its tangible personal property in New York State as detailed in this report (actual value)	20,000

§Average total actual value of shares of stocks of other corporations owned by it and allocated to this State by rule below ....

Total $230,000 00

Additional Information

To be used to determine fees under §181 of tax law and one mill tax

(1) Average monthly bank and cash balance in New York State during the year.... $50,000 00

(2) *Average value of all bills and accounts receivable in New York State during the year ..... None

(3) Average value of bonds, loans on call and other financial securities held, used or employed in New York during the year (not including shares of stock) ..... None

[fol. 36] *All bills and accounts receivable due for goods located in New York State at the time of sale or receivable by the corporation at an office within New York State and not already included in (a), (b), (c), and (d), in assets segregated to New York State, must be included in this item.

†Real property and tangible personal property shall be taken at its actual value where located.

§The value of shares of stock of another corporation owned by a corporation liable hereunder shall for purposes of allocation of assets be apportioned in and out of the State in accordance with the value of the physical property in and out of the State representing such share stock.

Average Price at Which This Corporation's Stocks Sold During the Year

		High	Low
Common	.....	.....	.....
Preferred	.....	.....	.....
No par	250,000	22½	6½

How many shares of the corporation's stock were transferred on its books during the period covered by this report? ——.

Above must be answered.

Distribution Schedule (Must be Completed)

If the company's entire tangible personal property in this State is in one city, or in one town outside a city or incorporated village, the schedules below need not be made, [fol. 37] but the name of the city, or town, or incorporated village, and of the county where located, must be entered in panel.

Do not confuse the political subdivisions "incorporated village" and "town."

Names of hamlets or postoffices other than incorporated villages are not wanted.

City: Plattsburg.

Town: ——.

Incorporated village: ——.

County: Clinton.

Schedule of Real and Tangible Personal Property in New York State by Cities, Towns and Incorporated Villages

City of	County of	Personal, actual value	Real estate, actual value	Real estate, assessed value
		$	$	$
		$	$	$
		$	$	$
		$	$	$
		$	$	$
		$	$	$

Town of	Incorporated village of	County of		
			$	$
			$	$
			$	$
			$	$
			$	$
			$	$

(If more space is needed add a paster)

[fol. 38]

Penalties

Any officer making a fraudulent report becomes personally liable to a fine of $1000.

The law provides a penalty of not more than $5,000 for neglect or refusal to file this report.

For failing, through negligence, to pay tax when due ten per cent of the tax due and unpaid plus interest at the rate of 1 per cent per month during the period in which it remains unpaid.

Information

The word "average" wherever it appears in this report has its plain, ordinary significance; neither the highest amount nor the lowest, but the mean.

In making report every space must be used except where the blank states that the spaces are not to be filled. Wherever no figures are to be inserted the word "none" should be inserted.

If there is no net income to be returned in answer to paragraph (8) insert the word "deficit" and state the amount thereof.

All corporations must make this report except the following:

(1) Real estate corporations wholly engaged in the purchase and sale of and holding title to real estate for themselves (this does not include so-called real estate companies having leasehold interests only, except as specified in subd. 2 below, or real estate agents or brokers).

[fol. 39] (2) Corporations engaged in the business of subleasing real property held under a leasehold for a term of twenty years or more, by the terms of which the taxes on the real property are paid by the lessee corporation as part of the consideration for the leasehold.

(3) Corporations whose sole business consists of holding stocks of other corporations for the purpose of controlling the management and affairs of such other corporations, except such as are specifically subject to report under the provisions of subdivision nine of section two hundred and eleven of the tax law.

(4) Transportation, transmission, heating, lighting and power corporations, insurance companies, banks, savings banks, trust companies and other corporations taxable under Sections 184 to 189 of the tax law, inclusive.

Simply to write "out of business," "never began business," "dead," et cetera, is not a sufficient compliance to relieve from the penal provisions of the statute.

Special Instructions to New Corporations

Corporations incorporated prior to July 1, 1925, which do not file an income tax report with the Federal Government for a period ending prior to July 1, 1925, must make this report showing status of company as of June 30, 1925. Items 8 to 12 inclusive may be answered by the words "No report made to the Federal Government" and other questions should be answered in accordance with instructions on this blank.

[fol. 40] Corporations incorporated between July 1, 1925 and November 1, 1925, will be supplied with Form 60 C. T. upon which a full report must be made on or before November 30, 1925.

This tax is due and payable on or before January 1, 1926, or within 30 days of billing date if billed after December 3, 1925. Do not send check with report.

Names, Residence Addresses, Compensation, etc., of Officers

Name and residence	Title	Salary	All other compensation	Number shares held	
				Preferred	Common
Leo Potter, New York	Pres	25,000	None	.....	100
J. W. Guilbord, Plattsburg	Secy & Treas	None	None	.....	2,000
W. M. Levy "	Vice Pres	None	None	.....	1,710

Must Be Answered

Information Required

(A) Gross sales from trading or manufacturing, less returns and allowances: $——.

(B) Gross profit from trading and manufacturing: $——.

(C) Gross profit from other than trading and manufacturing: $——.

(D) Entire assets: $——.

(E) Entire liabilities, excluding capital stock and surplus: $——.

[fol. 41] (F) Net worth as shown by balance sheet at end of calendar or fiscal year: $——.

(G) Number of people employed: Average 50 to 300.

(H) What was the total par value of all: (1) Federal bonds $ None; (2) Federal Farm Loans $ None; (3) State and Municipal Bonds $ None; (4) All other obligations shown in your return to the Federal Government and exempt from Federal Income Tax $ None.

(If none are held, insert the word "None.")

(Written across face:) Fiscal year not ended.

Form 3 IT. File with State Tax Department, (25) Albany, N. Y. Taxation of corporate franchises under article 9-a of the tax law. Thermiodyne Radio Corp. 10-24 Del. Plattsburg, N. Y. Report Due July 1, 1925.

[fol. 42] Affidavit of President, Vice-president, Secretary, or Treasurer

State of New York,
County of New York, ss:

On this 11 day of June, A. D. 1925, personally appeared before me, a Notary Public in and for the County of New York V. S. Johnson, Asst. Treas. of the above-named company who, being duly sworn according to law, did depose and say that the foregoing report is just, true and correct

and that it includes a true statement of the annual net income of said company for the year.

V. S. Johnson, Asst. Treas. (Official Title.)

Sworn to before me the day and year aforesaid.
Joseph B. Bell, Notary Public, Bronx County 180.
N. Y. County 1017. Comm. expires 3/30/27.

[fol. 43] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO TESTIMONY

(Issuance of Stock)

It is hereby stipulated and agreed by the trustees of the above-named bankrupt estate and the New York State Tax Department, by their respective attorneys undersigned, as follows:

(1) That 196,800 shares of the capital stock of the above-named bankrupt were issued in consideration for the sale and transfer to the bankrupt of all of the assets, subject to all the liabilities, of Shepard-Potter Co., Inc., pursuant to an offer made to the bankrupt, which was conditional [fol. 44] upon the granting by the bankrupt to H. D. Williams & Co., 120 Broadway, New York City, of an option to purchase the remaining authorized shares of its capital stock, 4,200 shares at $7.14 on or before December 1, 1924; 21,000 shares at $7.14 on or before December 29, 1924; 28,000 shares at $7.14 on or before February 1, 1925; and 50,000 shares at $7.50 on or before July 1, 1925, but that of said amounts only 53,200 shares were issued.

(2) That a balance sheet of said Shepard-Potter Co., Inc., showing the condition of its books at or about the time of said transfer, is hereto annexed marked "A."

(3) That if the hearing on the objections to the claims hereinabove mentioned were reopened, the Trustees would produce witnesses who would be competent to testify and would testify that the fair value at or about the time of said

transfer of all of the assets of said Shepard-Potter Co., Inc., other than the assets designated on said balance sheet as "Advertising & Sales," "Engineering," "Organization" and "Patents, Trade-marks, Development & Prepaid Royalties," was less than the amount of accounts payable and notes payable shown on said balance sheet; and that the attorney for the State Tax Department would object to the introduction of such testimony as irrelevant and immaterial and if admitted would take an exception.

(4) That this stipulation may be made part of the record on the objections to said claims with the same effect as if [fol. 45] such hearing were reopened and such testimony offered, objection made and exception taken.

Dated New York, November 17, 1927.

Ralph M. Arkush, Attorney for Trustees. Albert Ottinger, W. M., Attorney for State Tax Department.

A

Victor L. Johnson, Industrial Accountant, Tax Accountant, Malone, N. Y.

October 28, 1924.

Shepard-Potter Co., Inc., Plattsburgh, N. Y., Balance Sheet

Assets			
Current:			
Cash on Hand	$2,930.70		
Accounts Receivable	56,808.59		
		$59,739.29	
Inventory:			
Merchandise	29,201.90		
Raw Materials	23,877.79		
Laboratory	3,160.70		
Printing & Stationery	1,200.00		
		57,449.39	
			$117,188.68
[fol. 46] **Prepaid Charges:**			
Advertising & Sales		30,701.97	
Engineering		6,444.97	
Organization		276.00	
Insurance		308.00	
			37,730.94
Fixed Assets:			
Equipment		17,363.05	
Patents, Trade-marks Development & Prepaid Royalties		284,352.15	
Advertising Cuts		383.96	
			302,099.16
Total			$457,018.78

Liabilities

Current:		
Accounts Payable	29,475.15	
Notes Payable	52,339.69	
		81,814.84
Proprietorship:		
Common Stock	100,000.00	
Preferred Stock	250,000.00	
Surplus	25,203.94	
		375,203.94
Total		$457,018.78

[fol. 47] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO TESTIMONY

(Certificate of Authority and Situs of Property)

It is hereby stipulated and agreed by the Trustees of the above-named bankrupt and the New York State Tax Department, by their respective attorneys undersigned, as follows:

(1) That if the hearing on the objections to the claims hereinbefore mentioned were reopened, the Trustees would produce witnesses who would be competent to testify and would testify that a certificate of authority under General Corporation Law, Section 15, was duly issued to the bankrupt in or about November, 1924, and that the real estate owned by the bankrupt on October 31, 1925, consisted of [fol. 48] land and buildings situated at Plattsburg, County of Clinton, State of New York, constituting a manufacturing plant; and that the attorney for the State Tax Department would object to the introduction of such testimony as irrelevant and immaterial and if admitted would take an exception.

(2) That this stipulation may be made part of the record on the objections to said claims with the same effect as if such hearing were reopened, such testimony offered, objection made and exception taken.

Dated New York, March 13, 1928.

Ralph M. Arkush, Attorney for Trustees. Albert Ottinger, R. R. S., Attorney General, Attorney for State Tax Department.

[fol. 49] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO TESTIMONY

(Sale of Stock on October 31, 1925)

It is hereby stipulated and agreed by the Trustees of the above-named bankrupt estate and the New York State Tax Department, by their respective attorneys undersigned, that:

(1) If witnesses were produced on behalf of the Trustees on a further hearing of the objections filed by the Trustees to the above-mentioned claim, such witnesses would testify that sale of 1,400 shares of the capital stock of Thermiodyne Radio Corporation, the above-named Bankrupt, were made on the Exchange maintained by the New York Curb [fol. 50] Association on October 31st, 1925, at the following range of prices, to wit: High 9, Low 8, and that the witnesses so produced would be competent to establish such facts.

(2) That upon the offer of such testimony, the attorney for the State Tax Department would object to the admission thereof as irrelevant and immaterial on the ground that Section 214 of the Tax Law required an average market price for the entire year to be taken as one of the bases of the tax and not the market price on any particular day.

(3) That this Stipulation may be submitted to the Referee and constitute part of the record, in lieu of the testimony and objections above mentioned.

Dated New York, October 19th, 1927.

Ralph M. Arkush, Attorney for Trustees. Albert Ottinger, WM., Attorney for State Tax Department.

[fol. 51] IN UNITED STATES DISTRICT COURT

[Title omitted]

REFEREE'S OPINION

Memorandum on Claims of the New York State Tax Department

License Fee and Franchise Tax

The Department of Taxation and Finance of the State of New York has filed in this proceeding a proof of claim for a license fee in the sum of Fifteen Thousand Dollars ($15,000.00), the same being a fee assessed against the bankrupt for the privilege of exercising its corporate franchise in carrying on its business in the State of New York. The amount of the tax is based upon the capital stock of the corporation, being Two Hundred and Fifty Thousand (250,000) shares without par value and the tax is six (6) cents per share. The Department of Taxation and Finance of the State of New York has also filed a claim for a franchise tax in the sum of Three Thousand Six Hundred and Twenty-five Dollars ($3,625.00).

To these two claims the trustees have filed objections upon the ground that the bankrupt is not indebted to the [fol. 52] State of New York for license fee or franchise tax in any sum whatsoever. Objection was made to the form of this objection by the State of New York on the ground that it was not sufficiently specific. The objection of the State of New York was overruled by the Referee and an exception was asked and granted. Thereafter the controversy was heard upon its merits.

Section 64a of the Bankruptcy Act provides:

"The Court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, County, District, or Municipality, * * * and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the Court."

The above section gives to the Court of Bankruptcy, I believe, the power to pass upon every aspect of a tax filed

against a bankrupt and to determine not only the question of the legality of the method of assessment of the tax but also the amount thereof, precisely as if no assessment had been made by a state taxing agency.

New Jersey vs. Anderson, 203 U. S. 483.
In re Hefferon Company, 216 Fed. 642.
In re F. C. Fisher Corporation, 229 Fed. 316.
In re United Five and Ten Cent Store, Inc., 242 Fed. 1005.
In re Anderson, 275 397.
Remington on Bankruptcy (3rd Ed.), Book 6, Paragraph 284.
Collier on Bankruptcy (13th Ed.), pages 1444 and 1445.

[fol. 53] The franchise tax of Fifteen Thousand Dollars has been assessed under Section 18 of Article 9 of the New York Tax Law, which provides, inter alia: "On the issued capital stock of any corporation issuing shares without designated monetary value, such corporation shall pay for the use of the state a license fee of six cents on each share employed in this state as hereinbefore provided." The referee does not see that it is necessary to determine whether or not the trustees are bound upon the return made by the bankrupt to the Tax Department for taxation purposes (New York State Tax Department, Exhibit One). The contention of the trustees that the bankrupt was engaged in interstate commerce does not seem pertinent. The decisions of the Appellate Division of the State of New York, cited upon the brief of the Attorney-General of New York, relate to domestic corporations upon which the license fee was sought to be imposed. The bankrupt was a corporation foreign to New York, merely licensed to do business therein.

Admittedly, a State may impose upon a domestic corporation such taxes as it sees fit before granting to it a franchise. A state cannot, however, compel a foreign corporation to pay a license fee based upon an arbitrary multiplication of a rate per share times the number of shares of outstanding capital stock of the corporation without regard to the value per share of the stock which it is taxing. In the case of Air-Way Electric Appliance Corporation vs.

Day (266 U. S. 71), 45 Supreme Court Reporter, at page [fol. 54] 15, Mr. Justice Butler delivered the opinion of the Supreme Court of the United States upon the question of the constitutionality of a tax analogous to that of the instant case attempted to be levied upon a Delaware corporation by the State of Ohio, as follows:

"It is clear that the mere number of authorized non par value shares is not a reasonable basis for the classification for the purpose of determining the amount of such annual fees. Such a classification is not based on anything for a relation to the purpose for which it is made. Southern Railway Company vs. Greene, 216 U. S. 400; Royster Guano Company vs. Virginia, 253 U. S. 412. The Act has no tendency to produce equality; and it is of such a character that there is no reasonable presumption that substantial equality will result from its application. Martin vs. District of Columbia, 205 U. S. 135. Gast Realty Company vs. Schneider Granite Company, 240 U. S. 55. Kansas City Southern Railway vs. Road Improvement District, 256 U. S. 658. The act violates the equal protection clause of the Fourteenth Amendment."

People vs. Emerson, 271 U. S. 50.
Wickersham, Stock Without Par Value, Sec. 77.
38 Harvard Law Review, 361.

The claim of the State of New York for a license fee in the sum of Fifteen Thousand Dollars will therefore be disallowed.

The franchise tax is based on Article 9-A of the New [fol. 55] York Law which provides for a tax on business corporations based on net income. Section 219 provides for the computation of the tax on that portion of the entire net income of the corporation determined to be within the State of New York. It also provides for a minimum tax upon issued capital stock at its face value and then concludes: "But if such a corporation has stock without par value, then the basis of the tax, with relation to such stock, shall be such a portion of such issued capital stock, at not less than its actual or market value, and not less than Five Dollars ($5.00) per share, as may be determined by the Tax Commission as its gross assets employed in its business in this State bear to the entire gross assets employed in its

business." Pursuant to Article 9-A of the Tax Law, the bankrupt made a report showing that it was organized in October, 1924, under the laws of Delaware, that it began to do business in New York in November, 1924, that it had issued two hundred and fifty thousand (250,000) shares without par value, and that the amount paid in was Five Hundred and Eighty Thousand Dollars ($580,000.00). The bankrupt further reported that its total segregated assets wherever located were worth Two Hundred and Thirty Thousand Dollars ($230,000.00) and that its assets segregated to the State of New York amounted to the same sum. As additional information, the bankrupt reported that the average price at which the bankrupt stock was sold during the year was "high 22½; low, 6½" (New York State Tax Department, Exhibit One).

[fol. 56] The State Tax Department averaged the high price and low price and multiplied the average by the total number of outstanding shares of capital stock and assessed a tax of one mill per dollar against this total. The resulting tax thus claimed to be due was in the sum of $3,625.00. There is no testimony as to how many sales of capital stock of the bankrupt took place at the price of 22½ or 6½ or whether 14½ was a fair average of the market value of the stock. I therefore am of the opinion that the method of assessment employed by the New York State Tax Department was not such as was authorized by Section 214 of the New York State Tax Law, which has been quoted above. In the opinion of the referee there should be a reassessment of the tax on the basis of the value of the capital stock as of October 31st, 1925, as provided for by Section 214 of the New York State Tax Law. This value, according to the stipulation heretofore filed and made a part of the record of this case, was $8.50 per share. Therefore the assessment upon Two Hundred and Fifty Thousand (250,000) shares of the value of $8.50 per share would be Two Thousand One Hundred and Twenty-five Dollars ($2,125.00). This claim is of course entitled to priority.

Orders upon the said claims will be entered in conformity with this memorandum.

Dated, February 15th, 1928.

[fol. 57] In United States District Court

[Title omitted]

Referee's Order Rejecting Claim

Claim No. 116

And Now, to-wit, this Sixteenth day of February, A. D. 1928, upon the evidence submitted to the Referee upon the claim of State Tax Department, Albany, New York, for license fee in the sum of $15,000.00;

It is ordered by the Referee, that the said claim be disallowed and expunged from the list of claims.

(S.) John Biggs, Jr., Referee in Bankruptcy.

Filed February 16, 1928. Filed February 16th, 1928, 3 P. M. (S.) John Biggs, Jr., Referee.

[fol. 58] In United States District Court

[Title omitted]

Petition for Review of Referee's Order

To John Biggs, Jr., Esq., referee in bankruptcy:

Your petitioner respectfully shows that your petitioner is a creditor of the above-named bankrupt, and that its claim for license fee heretofore filed, in the sum of $15,000.00, (Fifteen Thousand Dollars), has been disallowed by the Referee herein, and that on the 16th day of February, 1928 an order, copy of which is hereto annexed, was made and entered herein;

That said order was, and is, erroneous, in that:

(1) The Referee erred in holding that Section 181 of the Tax Law of the State of New York, relating to the method of assessment of the amount of license fee upon the stock of a corporation having no par value, is unconstitutional, whereas said statute was a constitutional exercise of the power of the Legislature of the State of New York in de-

[fol. 59] termining the amount to be paid as license fee by

a foreign corporation, as a condition for permission to do business within the territorial jurisdiction of the State of New York; that the State of New York possessed the absolute power of exclusion of foreign corporations, and had the absolute right to fix and determine any tax or license fee as a condition for granting that which it could arbitrarily withhold:

(2) That the Referee erred in holding that the Legislature of the State of New York, in assessing a license tax of 6¢ (six cents) on each share of stock of no par value employed in this State, acted in an arbitrary and unconstitutional manner, whereas the legislative enactment upon which the claim of the State of New York for license fee rests was a reasonable exercise of the legislative discretion in placing foreign corporations doing business in the State of New York on equal terms with domestic corporations organized and doing business in said State, and designed to prevent foreign corporations from doing business to the disadvantage of domestic corporations deriving their proper rights and privileges from the State of New York;

(3) That the Referee erred in entertaining the defense of the unconstitutionality of Section 181 of the Tax Law of the State of New York, relating to assessment of license fee on stock of a foreign corporation having no par value, in that the corporation in this proceeding applied for and received the right to do business in the State of New York [fol. 60] upon the undertaking that, when the lapse of the statutory period made possible the determination of the proportion of its capitalization employed in business in the State of New York, it would pay the amount of license fee as then calculable, the amount thereof relating back to the date of receiving the privilege applied for from the State; that the corporation herein has availed itself of, and enjoyed the privileges and rights conferred by the State of New York in the issued permission to do business within said State, and that said corporation was and is, and that the Receiver and Trustee of said corporation, standing in its place, were and are, estopped and precluded from asserting the unconstitutionality of the statute relating to assessment of the license fee;

(4) That the Referee erred in entertaining any defense to the method of assessment of the license fee herein, on the ground that the said corporation had a remedy of review of the assessment of said license fee before The State Tax Commission of the State of New York, and, thru certiorari to the Supreme Court of the State of New York, under Section 199 of the Tax Law of the State of New York, which remedy of adjustment or review has not been taken by either the corporation or the Receiver or Trustee in this proceeding, and that, in the absence of exhausting such remedy, neither the Referee nor the U. S. District Court had any jurisdiction to review the finality of the assessment as made by the State Tax Commission of the State of New York.

[fol. 61] Wherefore, your petitioner, feeling aggrieved because of such order, prays that the same may be reviewed, as provided in the Bankruptcy law and General Order XXVII.

Dated New York City, N. Y., February 23, 1928.

Department of Taxation & Finance of the State of New York, Petitioner, by Albert Ottinger. Albert Ottinger, Attorney-General of the State of New York.

Claim No. 116.

In the District Court of the United States for the District of Delaware

No. 579. In Bankruptcy

In the Matter of Thermiodyne Radio Corporation, Bankrupt

And now, to-wit, this sixteenth day of February, A. D. 1928, upon the evidence submitted to the Referee upon the claim of State Tax Department, Albany, New York, for license fee in the sum of $15,000.00;

[fol. 62] It is ordered by the Referee that the said claim be disallowed and expunged from the list of claims.

(S.) John Biggs, Jr., Referee in Bankruptcy.

Filed February 16, 1928, 3 P. M. (Signed) John Biggs, Jr., Referee.

Duly sworn to by William Matthews. Jurat omitted in printing.

[fol. 63] In United States District Court

[Title omitted]

Referee's Certificate

To the Honorable Hugh M. Morris, Judge of the District Court of the United States for the District of Delaware:

I, John Biggs, Jr., the referee in bankruptcy in charge of this proceeding, do hereby certify:

That in the course of such proceeding an order, the original of which is made a part of this record, was entered on the 16th day of February, A. D. 1928.

That, on the 24th day of February, A. D. 1928, the Department of Taxation and Finance of the State of New York, a claimant in such proceeding, feeling aggrieved thereat, filed a petition for review, which was granted.

That the errors complained of by the petitioner are set forth in full in its petition.

That the record of the evidence upon which such order was based is annexed hereto.

That the questions presented on this review are:

[fol. 64] (1) Whether or not the referee erred in disallowing the claim of the Department of Taxation and Finance of the State of New York for a license fee in the sum of $15,000.00, as a preferred claim against the estate of the above named bankrupt.

(2) Whether or not the referee erred in disallowing the claim of the Department of Taxation and Finance of the State of New York for a license fee in the sum of $15,000.00 as a general claim against the estate of the above named bankrupt, and in ordering the said claim be expunged from the list of claims.

I hand up herewith for the information of the Judge, the following papers:

(1) The claim of the Department of Taxation and Finance of the State of New York filed in this proceeding.

(2) The objections of the trustees thereto.

(3) The Transcripts of the evidence taken at the hearing of the said claim.

(4) All exhibits.

(5) The order of the referee.

(6) The petition upon which this certificate is granted.

(7) All other papers filed with me herein which are pertinent to this review.

Respectfully submitted.

John Biggs, Jr., Referee in Bankruptcy.

February 24th, 1928.

[fol. 65] In United States District Court

[Title omitted]

Notice of Motion for Review of Referee's Order

Sirs: Please take notice, that upon the Certificate of Review, dated February 24, 1928, and duly filed by the Referee in the office of the Clerk of this Court on or about the said 24th day of February, 1928, and upon all the other papers and proceedings heretofore had herein, the undersigned will move this Court, at a stated term thereof, to be held at the Court House thereof, in the Federal Building in the City of Wilmington, Delaware, in said District of Delaware, on the 15th day of March, 1928, at ten o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, for an order reversing the order of the Referee herein, dated February 16, 1928, disallowing and expunging from the list of claims in this proceeding the claim of the Department of Taxation & Finance of the State of New York for a License Fee in the sum of Fifteen Thousand ($15,000) Dollars as a preferred claim against [fol. 66] the estate of this bankrupt, and further directing that said claim be allowed in full as a priority claim, to-

gether with interest as claimed therein, and for such other, further or different relief in the premises as may be just.

Dated New York City, N. Y., March 3, 1928.

Yours, &c., Albert Ottinger, Attorney-General of the State of New York, Attorney for the Department of Taxation and Finance of the State of New York. Office & P. O. address: Capitol, Albany, N. Y. New York City Bureau: 49 Chambers Street, Bor. of Manhattan, City of New York.

To James I. Boyce, Esq., Dupont Building, Wilmington, Del.; Ralph M. Arkush, Esq., 37 Wall Street, Bor. of Manhattan, New York City, attorneys for trustees.

[fol. 67] In United States District Court

No. 579. In Bankruptcy

In the Matter of Thermiodyne Radio Corporation, Bankrupt

In re Petition for Review of Order of Referee Disallowing Claim of State of New York for $15,000 License Tax

Opinion—May 18, 1928

Upon this review of an order of the Referee disallowing a claim of $15,000 filed by the State of New York, the sole question is the constitutionality of the statute of New York upon which the claim is based. That statute, Section 181, Article 9, of the Tax Law of that state prescribes the "license fee" to be paid by a foreign corporation for the privilege of exercising its corporate franchises or carrying on its business in the State of New York. Acting under this statute the State Tax Commission, on December 21, 1926, fixed the amount of the license fee due by the bankrupt, a Delaware corporation, at $15,000 for which the claim was filed.

The clause of the Constitution, asserted by the trustee and held by the Referee to invalidate the statute, is that found in the Fourteenth Amendment forbidding a State to [fol. 68] "deny to any person within its jurisdiction the

equal protection of the laws." The part of the statute wherein the trustee finds more particularly the crux of the denial of equality to the bankrupt, all of whose 250,000 shares of issued capital stock is without par value, is that fixing without regard to the value of the shares or the assets represented thereby a fee of six cents on each such share employed in the State of New York of any corporation issuing shares without designated monetary value. It is not disputed that all of the outstanding shares of the bankrupt were employed in that state.

That a tax computed upon such basis is lacking in equality was settled by the Supreme Court, in Air-Way Corp. v. Day, 266 U. S. 71, 85, where the Court, considering the validity of an Ohio statute prescribing an annual fee computable in like manner and payable by each foreign corporation having stock without par value, said:

"It is clear that the mere number of authorized non par value shares is not a reasonable basis for the classification of foreign corporations for the purpose of determining the amount of such annual fees. Such a classification is not based on anything having relation to the purpose for which it is made. Southern Ry. Co. v. Greene, 216 U. S. 400, 417; Royster Guano Co. v. Virginia, 253 U. S. 412, 415. The act has no tendency to produce equality; and it is of such a character that there is no reasonable presumption that substantial equality will result from its applica-[fol. 69] tion. Martin v. District of Columbia, 205 U. S. 135, 139; Gast Realty Co. v. Schneider Granite Co., 240 U. S. 55, 58; Kansas City Southern Ry. Co. v. Road Improvement District, 256 U. S. 658, 660. The act violates the equal protection clause of the Fourteenth Amendment."

The State of New York, however, as I understand it, makes no contention that the statute is productive of equality. On the contrary, showing that a foreign corporation is not a citizen within the meaning of Article 4, Section 2, of the Federal Constitution, Security Mutual Life Insurance Co. v. Prewitt, 202 U. S. 246; National Council U. A. M. v. State Council, 203 U. S. 151; Horn Silver Mining Co. v. New York, 143 U. S. 305; Philadelphia Fire Association v. New York, 119 U. S. 110; Pembina Mining Co. v. Pennsylvania, 125 U. S. 181; Norfolk, &c. R. R. Co. v. Penn., 136

U. S. 114, and that a foreign corporation must first have come within the jurisdiction of the taxing state before it can claim the protection of the Fourteenth Amendment against discriminatory legislation, Sully v. American National Bank, 178 U. S. 289, 303; Blake v. McClung, 172 U. S. 239, 260, it urges only that the fee here sought to be collected, being for the privilege of the bankrupt's exercising its corporate franchises in the State of New York during the first year in which its business was there carried on, is a tax made in legal contemplation against a person not "within its jurisdiction" and, consequently, not within the Fourteenth Amendment. The line of demarcation [fol. 70] separating foreign corporations that are without the equal protection clause from those that come within it was graphically depicted by the Supreme Court in Hanover Ins. Co. v. Harding, 272 U. S. 494, 510-517, where it was said:

"In subjecting a law of the State which imposes a charge upon foreign corporations to the test whether such a charge violates the equal protection clause of the Fourteenth Amendment, a line has to be drawn between the burden imposed by the State for the license or privilege to do business in the State, and the tax burden which, having secured the right to do business, the foreign corporation must share with all the corporations and other taxpayers of the State. With respect to the admission fee, so to speak, which the foreign corporation must pay, to become a quasi citizen of the State and entitled to equal privileges with citizens of the State, the measure of the burden is in the discretion of the State, and any inequality as between the foreign corporation and the domestic corporation in that regard does not come within the inhibition of the Fourteenth Amendment; but, after its admission, the foreign corporation stands equal, and is to be classified with domestic corporations of the same kind.

"In this class of cases, therefore, the question of the application of the equal protection clause turns on the stage at which the foreign corporation is put on a level with domestic corporations, in engaging in business within the State.

. . . . . .

"By compliance with the valid conditions precedent, the [fol. 71] foreign insurance company is put on a level with all other insurance companies of the same kind, domestic or foreign, within the State; and tax laws made to apply after it has been so received into the State are to be considered laws enacted for the purpose of raising revenue for the State and must conform to the equal protection clause of the Fourteenth Amendment. * * *"

The Validity of the Statute, and so of the claim, is thus made to turn upon whether or not the statute in question prescribes conditions precedent to the admission of the foreign corporation to quasi citizenship or applies to the foreign corporation only after all conditions precedent have been complied with and the corporation been duly received into the State. In solving this problem Section 181 of the Tax Law must be considered in connection with Sections 15 and 16 of the General Corporation Law of the State of New York. Section 15 provides:

"No foreign stock corporation other than a moneyed corporation, shall do business in this state without having first procured from the secretary of state a certificate that it has complied with all the requirements of law to authorize it to do business in this state, and that the business of the corporation to be carried on in this state is such as may be lawfully carried on by a corporation incorporated under the laws of this state for such or similar business * * *. The secretary of state shall deliver such certificate to every such corporation so complying with the requirements of law. * * * No foreign stock corporation doing business in this state shall maintain any action [fol. 72] in this state upon any contract made by it in this state, unless prior to the making of such contract it shall have procured such certificate. * * *

Section 16 requires:

"Before granting such certificate the secretary of state shall require every such foreign corporation to file in his office a sworn copy in the English language of its charter or certificate of incorporation and a statement under its corporate seal, and the signature of its president, vice president or other acting head, particularly setting forth

the business or objects of the corporation which it is engaged in carrying on or which it proposes to carry on within the state, and a place within the state which is to be its principal place of business, and designating a person upon whom process against the corporation may be served within the state. * * *"

The part of Section 181 of the Tax Law with which we are concerned reads thus:

"Every foreign corporation * * * doing business in this State, shall pay for the use of the State a license fee of 1/8 of 1 per centum for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this State, to be computed upon the basis of the capital stock employed by it within this State during the first year of carrying on its business in this State. * * * The measure of the amount of capital stock employed in this State shall be such [fol. 73] a portion of the issued capital stock as the gross assets employed in any business within this State bear to the gross assets wherever employed in business. On the issued capital stock of any corporation issuing shares without designated monetary value such corporation shall pay for the use of the State a license fee of 6 cents on each share employed in this State as hereinbefore provided. For purposes of taxation, the capital of a corporation invested in the stock of another corporation shall be deemed to be assets located where the physical property represented by such stock is located. The amount of capital upon which such license fee shall be paid shall be fixed by the State Tax Commission, which shall have the same authority to examine the books and records in the State of such foreign corporation, and the employees thereof, as it has in the case of domestic corporations, and the State Tax Commission shall have the same power to issue a warrant for the collection of such license fees as now exists with regard to domestic corporations."

Prior to the passage of the last quoted section the Court of Appeals of the State of New York, in Lancester v. A. I. Co., 140 N. Y. 576 (1894), held that a foreign corporation, after filing the papers and procuring the certificate required

by Section 15 of the General Corporation Law, has the same right to transact business in that State as domestic corporations. That the enactment of Section 181 of the Tax Act was not a legislative nullification or modification of that decision is revealed by the section itself which makes the carrying on of business in the State of New York a [fol. 74] necessary prerequisite and condition precedent to the computation of the tax to be levied under that section. As held in Wood & Selick v. Ball, 190 N. Y. 217, there is in the Tax Law, Section 181, "A command to pay a license fee for the privilege of carrying on business in this state, but not until business has been carried on for a longer or shorter period, varying according to circumstances. • • • It cannot be paid in advance for it must first be computed and the computation is made on the basis of the capital stock employed in this State, which cannot be known in advance." Furthermore, the Courts of the State of New York have held that compliance with the provisions of Section 15 of the General Corporation Law and the procurement of the certificate required thereby, not payment of the fee under Section 181 of the Tax Act, are the conditions precedent, compliance with which put the foreign corporation on a level with domestic corporations. In Manufacturers' Commercial Co. v. Blitz, 131 A. D. 17 (1909), it was held that proof of compliance with Section 15 must be made by the plaintiff in an action by a foreign corporation whereas proof of non-compliance with Section 181 of the Tax Law is a matter of defense and must be pleaded and proved by the defendant. Halsey v. Jewett Dramatic Co., 190 N. Y. 231, decided that the failure of a complainant in an action by a foreign corporation to allege payment of the license fee is not a demurrable defect. Other cases have gone further and expressly decided that the provisions of Section 181 of the Tax Law constitutes a condition subsequent to the right of a foreign corporation [fol. 75] to carry on business within the State while the requirements of Section 15 of the General Corporation Law are conditions precedent. In fact, in Wood & Selick v. Ball, the Court of Appeals held not only that the provisions of Section 181 of the Tax Law constitute a condition subsequent but expressly stated that the Tax Law, Section 181, "Is a Revenue Act," while the General Corporation Law,

Section 15, is designed "to prescribe the conditions upon which foreign stock corporations may do business in this State."

. These decisions of the Courts of the State of New York make it manifest, I think, that Section 181 of the Tax Law of that State is of the character that the Supreme Court, in Hanover Insurance Co. v. Harding, 272 U. S. 494, held "must conform to the equal protection clause of the 14th amendment, while Air-Way Corp. v. Day, 266 U. S. 71, makes it equally obvious that the part of the statute pertaining to non-par stock does not so conform. As a result I see no escape from the conclusion that the statute under which the excise tax here in question was levied is unconstitutional and the tax invalid.

For these reasons the petition for review must be dismissed and the order of the Referee disallowing the claim must be affirmed.

(Sgd.) Hugh M. Morris, J.

May 18, 1928.

A true copy. Attest: H. C. Mahaffy, Jr., Clerk, by G. M. Bowdle, Deputy Clerk. (Seal.)

[fol. 76] In United States District Court

No. 579. In Bankruptcy

In the Matter of Thermiodyne Radio Corporation, Bankrupt

In re Petition for Review of Order of Referee Disallowing Claim of State of New York for $15,000 License Tax

Order Appealed From

And now, to wit, this 23rd day of May, A. D. 1928, the petition of the State of New York for a review of the order of the Referee disallowing the claim of the State of New York in the above stated cause for a License Fee in the sum of Fifteen Thousand Dollars ($15,000) having come on to be heard upon the record and having been argued by counsel, upon consideration thereof;

It is ordered, adjudged and decreed by the Court that the order of the Referee rejecting, disallowing and expunging the said claim from the list of claims upon the record in the above stated cause be and the same hereby is affirmed and that the said petition of the State of New York be and it hereby is dismissed.

Hugh M. Morris, D. J.

[fol. 77] In United States District Court

[Title omitted]

Stipulation as to Contents of Record

It is hereby stipulated and agreed by and between the solicitor for the appellants and the solicitor for the re-
[fol. 78] spondents above named, that pursuant to Rule of the United States Circuit Court of Appeals for the Third Circuit, the transcript of the record for the purpose of the appeal of the People of the State of New York from the order made herein May 23rd, 1928, shall contain the following:

Notice of Appeal.
Petition for appeal and allowance thereof.
Assignment of Errors.
Citation on Appeal.
Proof of Claim.
Referee's Notice of Objection to Claim.
Trustees' Notice of Rejection of Claim.
Minutes of hearing, exhibits and stipulations as to testimony.
Referee's opinion.
Referee's order rejecting claim.
Petition for review of referee's order.
Referee's Certificate.
Notice of Motion for Review of Referee's Order.
Opinion of the District Court.
Order Appealed from.
Stipulation as to Contents of Record.
Stipulation as to Corrections of Record.
Clerk's Certificate.

Dated July 15th, 1928.

Albert Ottinger, Attorney General of the State of New York, Solicitor for Claimants-Appellants. Ralph Montgomery Arkush, Solicitor for Trustees-appellees.

[fol. 79] UNITED STATES DISTRICT COURT

[Title omitted]

CERTIFICATE AS TO CORRECTNESS OF RECORD

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the United States Dis-
[fol. 80] trict Court for the District of Delaware in the above entitled matter as agreed upon by the parties.

Dated New York, July 15th, 1928.

Albert Ottinger, Attorney General of the State of New York, Solicitor for Claimants-Appellants. Ralph Montgomery Arkush, Solicitor for Trustees-Appellees.

[fols. 81 & 82] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 83] Minute entry of argument and submission, October 2, 1928, omitted in printing.

[fol. 84] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1928

No. 3897 (List No. 2)

PEOPLE OF THE STATE OF NEW YORK, Appellant,

vs.

GAMBLE LATHROP et al., Trustees Thermiodyne Radio Corp., Bankrupt, Appellees

ORDER ASSIGNING JUDGE—Filed Oct. 2, 1928

And now, to-wit, this second day of October, A. D. 1928, it is ordered that Hon. William H. Kirkpatrick, District

Judge, for the Eastern District of Pennsylvania, be, and he is hereby, assigned to sit in above case in order to make a full court.

Victor B. Woolley, Circuit Judge.

[File endorsement omitted.]

[fol. 85] In United States Circuit Court of Appeals

[Title omitted]

On Appeal from the United States District Court for the District of Delaware

Before Woolley and Davis, Circuit Judges, and Kirkpatrick, District Judge

Opinion—Filed Oct. 31, 1928

Per Curiam:

Affirmed on the opinion of Judge Morris.

[File endorsement omitted.]

[fol. 86] In United States Circuit Court of Appeals for the Third Circuit, October Term, 1928

No. 3897 (List No. 2)

The People of the State of New York, Appellant,

vs.

Gamble Latrobe et al., Trustees Thermiodyne Radio Corp., Bankrupt, Appellees

Judgment—Filed Oct. 31, 1928

This cause came on to be heard on the transcript of record from the District Court of the United States for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the

said District Court in this cause be, and the same is hereby affirmed, with costs.

Philadelphia, October 31, 1928.

Victor B. Woolley, Circuit Judge.

[File endorsement omitted.]

[fol. 87] In United States Circuit Court of Appeals

[Title omitted]

Assignment of Errors—Filed Dec. 21, 1928

And now comes the appellants, The People of the State of New York, by their counsel Albert Ottinger, Attorney-General of the State of New York, and respectfully represent that they feel themselves aggrieved by the proceedings and decree of United States Circuit Court of Appeals for the Third Circuit in the above entitled cause, which said decree was entered December 1st, 1928, and affirmed an order or decree entered in the District Court of the District of Delaware on the 23d day of May, 1928, expunging the claim of the People of the State of New York for a license fee assessed against the Thermiodyne Radio Corporation under Section 181 of the Tax Law of the State of New York on the ground that the statute under which same was assessed violated the provisions of the Constitution of the United States and assign error thereto as follows:

First. That the Court erred in affirming the order of the District Court of the United States for the District of Delaware disallowing the claim for license fee or tax of the [fol. 88] People of the State of New York in the sum of $15,000. That the Court, in making said decree or judgment, held that Section 181 of the Tax Law of the State of New York, providing for the assessment of Six Cents a share on stock of no par value, was a statutory enactment in violation of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States and was unconstitutional, whereas in law and in fact such statutory enactment providing for a license fee payable by for-

eign corporations seeking to do business in the State of New York was a constitutional exercise of the taxing power of the State of New York and in none of its terms and conditions violated any of the provisions of the Fourteenth Amendment of the Constitution of the United States.

Second. That the Court erred in making the judgment or decree complained of and holding Section 181 of the Tax Law of the State of New York relating to the method of assessment of the amount of license fee on the stock of a corporation having no par value unconstitutional, whereas said statute was a constitutional exercise of the power of the Legislature of the State of New York in determining the amount to be paid as a license fee by a foreign corporation, as a condition for permission to do business in the territorial jurisdiction of the State of New York; that the State of New York possessed the absolute power of exclusion over foreign corporations and had the absolute right to fix any tax or license fee as a condition for granting that which it may arbitrarily withhold.

Third. That the Court erred in making the judgment or decree complained of holding that Section 181 of the Tax Law of the State of New York violated the Equal Protec- [fol. 89] tion Clause of the Fourteenth Amendment of the Constitution of the United States and was unconstitutional by reason thereof, whereas in law and in fact the provisions of Section 181 of the Tax Law of the State of New York applied in equal degree to all foreign corporations seeking to do business in the State of New York and operated equally in like manner on all corporations falling in particular classifications of foreign corporations.

Fourth. That the Court erred in making the decree or judgment complained of and holding that the Legislature of the State of New York, in assessing the license fee or tax of Six Cents on each share of stock of no par value employed in this State acted in an arbitrary and unconstitutional manner, whereas the Legislative enactment upon which the claim of the State of New York for license fee rests was a reasonable exercise of the Legislative discretion in placing foreign corporations doing business in the State of New York on equal terms with domestic corporations organized and doing business in said State, and the provisions

of Section 181 of the Tax Law of the State of New York was designed to prevent foreign corporation- from doing business to the disadvantage of domestic corporations deriving their proper rights and privileges from the State of New York.

Fifth. That the Court erred in making the judgment or decree complained of in entertaining the defense of the unconstitutionality of Section 181 of the Tax Law of the State of New York, relating to the assessment of a license fee on the stock of a foreign corporation having no par value, in that the Thermiodyne Radio Corporation, the bankrupt, in this proceeding, as all foreign corporations do prior to the assessment and payment of the license fee in question, applied for and received the right to do business in the State [fol. 90] of New York upon the undertaking that, when the lapse of the statutory period made possible the determination of the proportion of its capitalization employed in business in the State of New York, it would pay the amount of license fee as then calculable, the amount thereof relating back to the date of the receipt of the privilege applied for in the State of New York; that the bankrupt corporation herein, in manner similar to all foreign corporations receiving license to do business in the State of New York under the statute involved in this proceeding, has availed itself of and enjoyed the privileges and rights conferred by the State of New York in the issued permission to do business within the said State, and that said corporation was and is, and that the appellees, the trustees and receivers of said corporation, standing in its place, were and are, estopped and precluded from asserting the unconstitutionality of the statute relating to the assessment of the license fee, a result which applies to all foreign corporations liable to the payment of the license fee involved in this case.

Sixth. That the Court erred in making the judgment or decree complained of and holding that the valuation of stock of no par value was determinable by the value of assets of the corporation used by it in the transaction of business in the State of New York during the period of one year subsequent to the issuance of the license to transact business in the State of New York; whereas in law and in fact the license fee exacted by the State of New York under

Section 181 of the Tax Law of said State of New York was for the admission of the corporation to the State of New York for the transaction of its business therein and was not dependent upon any business actually transacted or any assets except as the amount of said assets are necessary [fol. 91] to be determined to insure a proper segregation of the stock of said corporation so as to determine the proportion thereof employed in the State of New York and thus further to determine the amount that the corporation should pay, in accordance with its stipulated agreement for the license issued to it to transact business in the State of New York.

Wherefore the appellants pray the Honorable Court to examine and correct the errors assigned and for a reversal of the decree of the United States Circuit Court of Appeals for the Third Circuit entered in the above entitled case. That the appellants may have an adjudication and decree in their favor holding that Section 181 of the Tax Law of the State of New York in so far as the same relates to the method and procedure for the assessment of the license fee against the Thermiodyne Radio Corporation, bankrupt, was constitutional and not repugnant to any of the provisions of the Constitution of the United States and that the claim of the People of the State of New York for license fee amounting to $15,000 regularly and duly assessed under said statute is a valid priority claim against the estate of the said bankrupt and payable as such by the trustees and receivers thereof.

Dated December 10, 1928.

Albert Ottinger, Attorney-General of the State of New York, Attorney for Appellants, The People of the State of New York, Office & Post Office address: Capitol, Albany, N. Y.

[File endorsement omitted.]

[fol. 92] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted.]

NOTICE OF APPEAL—Filed Dec. 21, 1928

SIR:

Please take notice that The People of the State of New York hereby appeal to the Supreme Court of the United States from the judgment made herein on the 1st day of December, 1928, affirming the decree of the District Court of the United States for the District of Delaware, dated May 23d, 1928, expunging the claim of The People of the State of New York for a license fee amounting to $15,000 and from the whole and each and every part of said judgment and decision. This appeal is taken pursuant to Sections 239 and 240 of the Judicial Code.

Dated New York, N. Y., December 15th, 1928.

Yours, etc., Albert Ottinger, Attorney-General of the State of New York, Attorney for the Petitioners-appellants, The People of the State of New York. Office & Post Office address: Capitol, Albany, N. Y.

To Ralph Montgomery Arkush, Esq., attorneys for trustees in bankruptcy, appellees, 15 Broad Street, New York City, N. Y.

[fol. 93] [File endorsement omitted.]

[fol. 94] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted.]

PETITION FOR APPEAL AND ORDER ALLOWING SAME—Filed Dec. 21, 1928

The above entitled appellants, The People of the State of New York, respectfully show that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Third Circuit and that a judgment has

therein been rendered on the 1st day of December, A. D. 1928, affirming an order of the United States District Court for the District of Delaware, dated May 26th, 1928, affirming the order of the referee in bankruptcy made in the matter of the Themiodyne Radio Corporation, No. 579 in Bankruptcy, disallowing, rejecting and expunging the claim of The People of the State of New York from the list of claims amounting to $15,000 for a license fee under Section 181 of the Tax Law of the State of New York filed against said bankrupt upon the ground that Section 181 of the Tax Law of the State of New York, in as far as it provided for the assessment of Six Cents per share upon stock of foreign corporations employed in the State of New York during the first year of their operation in said State under a license granted by the State of New York, was un- [fol. 95] constitutional and enacted in violation of the Fourteenth Amendment of the Constitution of the United States.

That the matter in controversy in said suit exceeds One thousand Dollars besides costs. That the determination hereinbefore set forth is one in which is drawn in to question the validity of a statute of the State of New York on the ground of its being repugnant to the Constitution of the United States in the decision heretofore rendered by the Circuit Court of Appeals for the Third Circuit against its validity.

That the appellants herein rely upon the validity of the said State statute in the assertion of the aforesaid claim for license fee filed against the bankrupt and the case is one specified in Section 240 of the Judicial Code, subdivision b, in which the appellants are entitled to a review by the Supreme Court of the determination rendered upon an appeal from the determination made holding the statute relied upon as unconstitutional. That the only question involved in this case is whether or not Section 181 of the Tax Law of the State of New York, in as far as it provides for the payment of a license fee of Six Cents per share on all stock of no par value employed by foreign corporations in the State of New York during the first year following the receipt of license to do business in the State of New York, is constitutional under the provisions of the Constitution of the United States, and that it is a proper case to

be reviewed by the Supreme Court of the United States on appeal.

Wherefore the said appellants pray that an appeal be allowed them in the above entitled cause directing the Clerk of the United States Circuit Court of Appeals for the Third Circuit to send the record and proceedings in said cause, with all things concerning the same, to the Supreme [fol. 96] Court of the United States so that the errors complained of in the assignment of errors herein filed by the said appellants may be reviewed and if error be found, correct it according to the laws and customs of the United States.

Dated N. Y. Dec. 10, 1928.

Albert Ottinger, Attorney-General of the State of New York, Attorney for the Petitioner, The People of the State of New York. Office & Post Office address: Capitol, Albany, N. Y.

And now, to wit, this 10th day of December, A. D., 1928, upon reading and considering the foregoing petition, it is, upon motion of Albert Ottinger, Esq., Attorney-General of the State of New York, attorney for appellants,

Ordered by the Court that the appeal in the above entitled case to the Supreme Court of the United States be and hereby is allowed as prayed for. The appellees, the Trustees of the said bankrupt, Thermiodyne Radio Corporation, by James I. Boyce, their attorney, waiving the giving of bond for costs, no order as to bond is made.

Victor B. Woolley, United States Circuit Judge for the Third Circuit.

[fol. 97] In United States Circuit Court of Appeals

[Title omitted]

Waiver of Bond

The Appellees, Gamble Latrobe, Jr., James P. Knowles and William S. Erichs, Trustees in Bankruptcy of Thermiodyne Radio Corporation, hereby waive the filing of a bond by the appellants, The People of the State of New York,

in connection with the appeal to the United States Supreme Court from the judgment rendered by the United States Circuit Court of Appeals for the Third Circuit affirming the decree of the District Court of the United States for the District of Delaware, dated May 23d, 1928, expunging the claim of The People of the State of New York for license fee amounting to $15,000 upon the ground that the statute under which the same was assessed was unconstitutional under the provisions of the Constitution of the United States.

Dated Wilmington, Delaware, Dec. 10th, 1928.

James I. Boyce, Attorney for Appellees, Gamble Latrobe, Jr., et al., Trustees in Bankruptcy of Thermiodyne Radio Corporation.

[File endorsement omitted.]

[fol. 98] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

AFFIDAVIT OF AMOUNT IN CONTROVERSY—Filed Dec. 21, 1928

STATE OF NEW YORK,
City of New York,
County of New York, ss:

Robert P. Beyer, being duly sworn, on his oath, says: That he is a Deputy Assistant Attorney-General of the State of New York and is personally acquainted with the nature, amount and extent of the claim filed by the State of New York against the estate of Thermiodyne Radio Corporation, bankrupt, and that said claim amounts to the sum of $15,000 for license fee for the privilege of exercising the corporate franchises for carrying on its business for the first year following the receipt of license to do business based on amount of capital stock of no par value employed in the State of New York during said period pursuant to Section 181 of the Tax Law of the State of New York, which claim has been rejected in its entirety for the sole ground that the statute under which it was

assessed is unconstitutional under the provisions of the Constitution of the United States and the matters referred to are in controversy in this suit and the amount in controversy amounts to the sum of $15,000 exclusive of interest and costs.

Robert P. Beyer.

Sworn to before me this — Dec., 1928. Abraham J. Lifton, Commissioner of Deeds, City of New York. New York (Clk. 16 Reg. 7-0), Kings (Clk. 114 Reg. 103), Bronx (Clk. 1 Reg. 30000), Queens (Clk. 1352 Reg. 1063), and Richmond. Commission expires Jan. 17, 1930. (Seal Commissioner of Deeds, City of New York.)

[fol. 99] [File endorsement omitted.]

[fol. 100] Citation, in usual form, filed December 21, 1928, omitted in printing.

[fol. 101] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 102] In Supreme Court of the United States

Statement of Points to be Relied Upon and Designation to Print Entire Record—Filed Jan. 2, 1929

The following is a definite Statement of Points on which the appellant intends to rely and on the parts of the records which he thinks necessary for the consideration thereof.

Points

1. The license exacted by the State of New York from foreign corporation seeking to do business in that State is distinguishable, in its assessment and nature, from a franchise tax.

2. The license fee imposed on a foreign corporation is similar to the organization tax imposed by the State on domestic corporations.

3. A foreign corporation is entitled to do business in the State of New York only at the discretion of such State, and under such terms and conditions as it may see fit to enforce. Such corporation is not, therefore, entitled to contest the constitutionality of the State statute embracing the conditions, assented to by the corporation, under which the certificate of the right to do business was granted.

4. The case of Air Way Co. v. Day, 226 U. S. 71, upon the authority of which the district court decided this case adversely to the appellants, is not controlling.

[fol. 103] 5. The determination of the amount of the license tax rests in the uncontrolled discretion of the State of New York.

6. No discrimination between foreign corporations liable to the payment of the license fee existed.

7. Section 181 of the Tax Law of the State of New York providing for the rate and assessment of license fee on foreign corporations having stock of no par value is not unconstitutional.

A certified copy of the transcript of the record in the United States Circuit Court of Appeals for the Third Circuit has been filed with the Clerk of this Court, and such certified copy of said record as filed is necessary to be printed by the Clerk of this Court in order to obtain adequate consideration of the questions involved in this appeal.

Dated New York, N. Y., December 31st, 1928.

Albert Ottinger, Attorney-General of the State of New York, Attorney for the Claimants-appellants.
Robert P. Beyer, Deputy Assistant Attorney-General of the State of New York, 49 Chambers Street, New York City.

To Charles Elmore Cropley, Clerk of the U. S. Supreme Court, Washington, D. C.; to Ralph Montgomery Arkush, Esq., Attorney for the Trustees-appellees, 15 Broad Street, New York City.

[fol. 104] Copy received this 31st day of December, 1928. Ralph M. Arkush, atty. for Trustees, Appellees.

[fols. 105-109] [File endorsement omitted.]

Endorsed on cover: File No. 33,910. U. S. Circuit Court of Appeals, Third Circuit. Term No. 601. The People of the State of New York, appellants, vs. Gamble Latrobe, Jr., James P. Knowles, and William S. Erichs, trustees. etc. Filed December 26th, 1928. File No. 33,910.

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Supreme Court of the United States

October Term, A. D. 1928

No. 601

THE PEOPLE OF THE STATE OF NEW YORK,
Appellants,

against

GAMBLE LATROBE, JR., JAMES P. KNOWLES and WILLIAM S. ERICHS, trustees in bankruptcy of THERMIODYNE RADIO CORPORATION,
Appellees.

APPELLANTS' STATEMENT AS TO JURISDICTION OF THE COURT UNDER SUBDIVISION 1 OF RULE TWELVE

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Supreme Court of the United States

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APPELLANTS' STATEMENT AS TO JURISDICTION OF THE COURT UNDER SUBDIVISION 1 OF RULE 12

The appeal in this case was taken pursuant to the provisions of Section 240 of the Judicial Code providing

> "Any case in a Circuit Court of Appeals where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States and the decision is against its validity, may, at the election of the party relying on such State statute, be taken to the Supreme Court for review on writ of error or appeal; but in that event a review on a certiorari shall not be allowed at the instance of such party and the review of such writ of error or appeal shall be restricted to an examination and decision of the Federal questions presented in the case."

This case comes before this Court on an appeal under said Statute to review the determination of the United States Circuit Court of Appeals for the Third

Circuit in holding that Section 181 of the Tax Law of the State of New York was unconstitutional in so far as said section provided as follows:

> "Every foreign corporation * * * doing business in this State, shall pay for the use of the State a license fee of ⅛ of 1 per centum for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this State, to be computed upon the basis of the capital stock employed by it within this State during the first year of carrying on its business in this State; * * *. The measure of the amount of capital stock employed in this State shall be such a portion of the issued capital stock as the gross assets employed in any business within this State bear to the gross assets wherever employed in business. On the issued capital stock of any corporation issuing shares without designated monetary value such corporation shall pay for the use of the State a license fee of 6 cents on each such share employed in this State as hereinbefore provided. For purposes of taxation, the capital of a corporation invested in the stock of another corporation shall be deemed to be assets located where the physical property represented by such stock is located. The amount of capital upon which such license shall be paid shall be fixed by the State Tax Commission which shall have the same authority to examine the books and records in the State of such foreign corporation, and the employees thereof, as it has in the case of domestic corporations, and the State Tax Commission shall have the same power to issue a warrant for the collection of such license fees as now exists with regard to domestic corporations."

The Thermiodyne Radio Corporation, the bankrupt herein, now represented by the appellees as trustees, commenced business in the State of New York pursuant to permission duly granted by that State on or about the 12th day of November, 1924, and during the first year of its operation employed in said State two hundred and fifty thousand shares of capital stock of no par value, upon which the Department of Taxation and Finance of the State of New York duly assessed a license fee under the provisions of the State statute quoted at the rate of Six Cents per share amounting in total to the sum of $15,000 for which claim was filed with the trustees herein and which claim was directed to be expunged by the judgment of the United States Circuit Court of Appeals for the Third Circuit, adopting the opinion of the District Court, on the ground that the statute quoted under which the license fee was assessed violated the provisions of the Federal Constitution of the United States.

The People of the State of New York, relying upon such State statute in asserting the validity of the license fee in question and being affected by the determination rendered, have appealed to this Court from such determination after due leave by the United States Circuit Court of Appeals for the Third Circuit. The only question involved in this appeal is whether or not the provisions of Section 181 of the Tax Law of the State of New York, as far as applicable to the instant case, violates the provisions of the Federal Constitution. Should this Court hold the negative then the license fee in question was duly assessed and is a valid claim entitled to a preferential payment by the trustees of the bankrupt.

The mandate of the Circuit Court of Appeals for the Third Circuit is dated December 1st, 1928, and has been duly attached to the certified copy of the record on file with the Clerk of this Court and the appeal

herein was duly allowed by the United States Circuit Court of Appeals for the Third Circuit on the 21st day of December, 1928. That the appellants particularly refer this Court to the opinion of Hon. Hugh M. Morris, District Judge, found on pages 67 to 75 inclusive of the record on file in the office of the Clerk of this Court in this case, upon which said opinion the Circuit Court of Appeals for the Third Circuit rendered its judgment of affirmance, from which it clearly appears that the sole question involved in this case is the constitutionality of the provisions of Section 181 of the Tax Law quoted under the Constitution of the United States. The case is therefore one that comes within the letter and spirit of the Federal Statute cited, in which this Court has jurisdiction to review the constitutional question through appeal by the aggrieved party as was taken in the instant case (*Del Pozo* vs. *Wilson Cypress Co.*, 269 U. S., 82).

Respectfully submitted,

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Supreme Court of the United States

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No. 601

THE PEOPLE OF THE STATE OF NEW YORK,
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GAMBLE LATROBE, JR., JAMES P. KNOWLES and WILLIAM S. ERICHS, trustees in bankruptcy of THERMIODYNE RADIO CORPORATION,
Appellees

BRIEF FOR THE APPELLANTS

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IN THE

UNITED STATES SUPREME COURT

THE PEOPLE OF THE STATE OF NEW YORK, *Appellants,* against GAMBLE LATROBE, JR., JAMES P. KNOWLES and WILLIAM S. ERICHS, trustees in bankruptcy of Thermiodyne Radio Corporation, *Appellees.*	No. 601 October Term 1928.

APPELLANTS' BRIEF

Preliminary Statement

This is an appeal, pursuant to Sections 239 and 240 of the Judicial Code, from a judgment of the Circuit Court of Appeals for the Third Circuit, affirming an order of the District Court for the District of Delaware, expunging the claim of the State of New York amounting to $15,000, due by the bankrupt, Thermiodyne Radio Corporation, a Delaware corporation, upon having received permission to do business in the State of New York.

The Circuit Court of Appeals held that Section 181 of the New York State Tax Law, providing for a license fee of six cents per share on all stock of no par

value employed by foreign corporations in said state during the first year of such operation was unconstitutional.

The State of New York, being aggrieved by such determination, has, under the statute, the right of direct appeal to this Court.

STATEMENT OF FACTS

The bankrupt herein having capital stock of no par value, amounting in total to two hundred and fifty thousand shares, the tax was levied by the State of New York pursuant to Section 181, Article 9, of the Tax Law of the State of New York, which provides, as far as applicable to the case at bar, as follows:

> "Every foreign corporation * * * doing business in this State, shall pay for the use of the State a license fee of ⅛ of 1 per centum for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this State, to be computed upon the basis of the capital stock employed by it within this State during the first year of carrying on its business in this State; * * *. The measure of the amount of capital stock employed in this State shall be such a portion of the issued capital stock as the gross assets employed in any business within this State bear to the gross assets wherever employed in business. On the issued capital stock of any corporation issuing shares without designated monetary value such corporation shall pay for the use of the State a license fee of 6 cents on each such share employed in this State as hereinbefore provided. For purposes of taxation, the capital of a corporation invested in the stock of another corporation shall be deemed

to be assets located where the physical property represented by such stock is located. The amount of capital upon which such license fee shall be paid shall be fixed by the State Tax Commission, which shall have the same authority to examine the books and records in the State of such foreign corporation, and the employees thereof, as it has in the case of domestic corporations, and the State Tax Commission shall have the same power to issue a warrant for the collection of such license fees as now exists with regard to domestic corporations."

The bankrupt corporation, pursuant to the provisions of the Tax Law, filed its annual report on or about the 12th day of June, 1925, the law requiring such reports to be filed annually on or before July 1 (New York State Tax Law, § 211). The License Fee imposed related back to the time when the foreign corporation received its right to do business in the State of New York; the value of such right being only determinable by the amount of capital stock employed in the State of New York during the first twelve months of the exercise of such right.

The bankrupt herein commenced doing business in the State of New York on or about the 12th day of November, 1924; consequently, this License Fee, payable as of said date, became due and determinable on or about November 13, 1925. It became the duty of the bankrupt corporation to file with the Department of Taxation and Finance of the State of New York a report known as "Form 240," giving the status of the corporation at the end of the first year of doing business within the State of New York. The corporation failed to file this report and, because of this delinquency, the State Tax Commission was obliged and

had legal authority to get its information as best it could, which accounts for the delay in the actual assessment of this License Fee which occurred on December 21, 1926. The report filed by the corporation and received in evidence shows that the bankrupt was incorporated in October, 1924, and commenced doing business in the State of New York on or about the 12th day of November, 1924. It further shows that up to June 30, 1925, two hundred and fifty thousand shares of stock of no par value had been issued, and the testimony further shows that this License Fee was assessed on the basis of the information contained in the corporation's own report, together with such other information as the Commission could secure, and that this License Fee was assessed on the basis of six cents per share on each of the two hundred and fifty thousand shares of non par value stock which had been issued. This resulted in an assessment of $15,000 under the statute.

The judgment appealed from does not question the method or amount of the assessment, but holds that the provision of § 181 of the Tax Law of the State of New York, providing that on issued capital stock of any corporation issuing shares without designated monetary value, such corporation shall pay for the use of the State a License Fee of six cents on each such share employed in this State as hereinbefore provided, violated the Fourteenth Amendment of the Federal Constitution, was unconstitutional and afforded no basis for the assessment made in this case.

This appeal, therefore, presents a pure question of law for the determination of this Court as to whether or not the statute is constitutional and whether the invalidity thereof claimed can be raised in the instant proceeding.

POINT I

The license fee exacted by the State of New York from foreign corporations seeking to do business in that State is distinguishable, in its assessment and nature, from a franchise tax.

The history of the creation of the license fee and its intended characteristics is stated in *People ex rel. Elliott-Fischer Co.* v. *Sohmer*, 148 App. Div. 514 (affirmed 206 N. Y. 634, on opinion below), as follows:

> "This license tax first came into our law by Chapter 240 of the Laws of 1895, which was entitled 'an act to provide for licensing foreign stock corporations.' It provided for such corporations then authorized to do business in this State, a license fee of one-eighth of one per centum, payable on December 1, 1895, 'to be computed upon the basis of the amount of capital stock employed by it within this state during the year preceding that date,' and for such corporations thereafter authorized to do business in this state it provided a like license fee payable before receiving the certificate of authority 'to be computed upon the basis of the capital stock employed by it within this state for its business during the first year of carrying on its business in this state.' The *tax* was to be paid but once. Chapter 143 of the Laws of 1886 imposed an organization tax on one-eighth of one per centum upon the capital stock of a domestic corporation, and in the year 1895 the Comptroller in his report to the legislature suggested that foreign corporations were required to pay no organization tax here, and, therefore, had an advantage over domestic corporations, which was an inducement to corporations to organize outside of the State to do business within the State, and he suggested that such cor-

porations should have no advantage over domestic corporations, and referred to the fact that the last legislature had passed an act which would compel foreign corporations to pay a *tax* similar to the organization tax of domestic corporations, but that the act was so defective that it was not suffered to become a law. It is evident by the passage of the statute in question immediately following the report, and from the nature of the act itself, that its purpose was to impose upon foreign corporations a *tax* similar to the organization tax required of domestic corporations."

POINT II

The license fee imposed on a foreign corporation is similar to the organization tax imposed by the State on domestic corporations.

Domestic corporations, proposing to issue stock of no par value, are required by the State of New York to pay, as part of the organization tax, five cents for each share of no par value stock authorized for issuance under its certificate. (Section 180, New York Tax Law.)

> "Every stock corporation incorporated under any law of this State shall pay a tax of one-twentieth of one per centum upon the amount of the par value of all the shares with a par value which it is authorized to issue and a tax of five cents on each share without a par value which it is authorized to issue, and a like tax upon any subsequent increase thereof."

This tax must be paid before or on incorporation, and no domestic stock corporation may lawfully exercise any corporate powers or privileges until such tax has been paid. (New York General Corporation Law,

Section 5.) The tax is imposed but once for the privilege of becoming a corporation. (*People ex rel. U. S. A. P. P. Co.*, 174 N. Y. 475, 478.) The tax being for the privilege of organization, and not a property tax, the power of the state to subject corporations availing themselves of the statute to any condition the legislature may see fit to impose cannot be questioned. (*People* v. *N. Y. C. & S. R. R. Co.*, 129 N. Y. 474, 480.) In the case of domestic corporations the payment of the statutory charge on authorized stock of no par value is clearly a condition precedent to the exercise of corporate rights.

The same right on the part of the state to prescribe any conditions it determines its welfare requires for the carrying on of corporate activity within its borders exists with respect to granting foreign corporations the right to do business.

In *Hanover Fire Insurance Co.* v. *Carr*, 272 U. S. 494 (47 Sup. Ct. Reporter, P. 179) it was held that the measure of admission fee to be paid by a foreign corporation is within the discretion of the State, and any inequality in that regard between foreign corporations and domestic corporations is not violative of equal protection clause of the Fourteenth Amendment. As Mr. Justice Taft said:

> "In subjecting a law of the state which imposes a charge upon foreign corporations to the test whether such a charge violates the equal protection clause of the Fourteenth Amendment, a line has to be drawn between the burden imposed by the state for the license or privilege to do business in the state and the tax burden, which, having secured the right to do business, the foreign corporation must share with all the corporations and other taxpayers of the state. With respect to the admission fee, so to speak, which the foreign

corporation must pay to become a *quasi* citizen of the state and entitled to equal privileges with citizens of the state, the measure of the burden is in the discretion of the state, and any inequality as between the foreign corporation and the domestic corporation in that regard does not come within the inhibition of the Fourteenth Amendment; but after its admission, the foreign corporation stands equal, and is to be classified with domestic corporations of the same kind."

There existed no material difference in the legislative treatment of domestic and foreign corporations. Domestic corporations paid five cents per share on authorized stock of no par value; foreign corporations were required to pay six cents per share on similar stock employed in the State of New York during the first year following the issuance of the certificate of authority to do business. The reason for the difference in time of payment is apparent. In the instant case, as stated in *Roberts & Schaeffer Co.* v. *Emmerson*, 271 U. S. 50, "the authority to issue its capital stock was a privilege conferred by another state, and bore no relation to any franchise granted to it by the State of Ohio, or to its business and property within that state." (In the instant case, substitute New York in place of "Ohio".)

Under Section 181 of the Tax Law, when one year shall have elapsed since the issuance of the certificate of authority, the report to the State Tax Commission would reflect the ratio of assets employed in the State of New York to those situated elsewhere and enable a determination of the proportion of stock of no par value employed in the State subject to the payment of the license or organization tax. Thereupon the extent of the liability of the foreign corporation to pay for the privilege theretofore granted was ascertainable

and its contract obligation to respond to this tax complete. The obligation was the same as in the case of organization tax by a domestic corporation, the difference in time of payment arising only because of the controlling necessities of the case.

POINT III

A foreign corporation is entitled to do business in the State of New York only at the discretion of such State, and under such terms and conditions as it may see fit to enforce. Such corporation is not, therefore, entitled to contest the constitutionality of the State statute embracing the conditions, assented to by the corporation, under which the certificate of the right to do business was granted.

In *People* v. *Fire Insurance Company of Philadelphia*, 92 N. Y. 311, the Court, per Finch, J., stated, page 325:

> "The situation is this: The state having the power to exclude foreign corporations, determines to do so unless they will submit to certain conditions. It meets the applicant on the border, forbidding admission, as it has a right to do, unless on condition that it will fulfill all the requirements of our statutes relating to foreign corporations, one of which is the very law here assailed. When the corporation comes in it agrees to the conditions. They become binding by its assent. The tax or license fee charged by the act of 1865 is one of these conditions. It is imposed as the price of admission to come within the jurisdiction, and not as a tax upon one already within the jurisdiction. The fourteenth amendment, therefore, has no application. It can apply to foreign insurance companies only after they have performed the conditions upon which they are entitled to admission. Any other view of the case involves this absurdity;

that the foreign company may agree to pay the tax charged by the act of 1865 so as to get within our jurisdiction, and then refuse to pay it while insisting upon the right to remain. It cannot agree to conditions as the price of admission, and after having been admitted turn around and dispute them. Even if the conditions were unconstitutional, which cannot be said of the terms of the act of 1865, considered as conditions, the foreign company may waive the objection. (*Embury* v. *Conner*, 3 N. Y. 511; *Sherman* v. *McKeon*, 38 N. Y. 267; *Phuyfe* v. *Eimer*, 45 N. Y. 103); and does do so when it accepts the conditions by coming in under them, and is estopped from raising the question. (*Vose* v. *Cockcroft*, 44 N. Y. 415.) Even where the condition was a violation of the Federal Constitution and the Supreme Court of the United States so declared, they refused to prevent the state from excluding the offending company and revoking its license. (*Doyle* v. *Continental Insurance Company*, 94 U. S. 535.) By that process, even in such a case, obedience could be compelled, at the peril of removal from the state."

In *Doyle* v. *Continental Insurance Company*, cited in the foregoing opinion, a law of Wisconsin provided that before a foreign insurance company could do business in that state, it should sign an agreement that in the event of being sued in that state it would not remove the case to the Federal courts, under the penalty of having its license immediately revoked by the Secretary of State. The law was confessedly invalid, nevertheless this stated:

"The effect of our decision in this respect is that the state may compel the foreign insurance company to abstain from federal courts or to

cease to do business in the state. It gives the company the option. This is justifiable, because the complainant has no constitutional right to do business in that state. The state has authority at any time to declare that it shall not transact business there. This is the whole point of the case, and without reference to the injustice, the prejudice or the wrong that is alleged to exist, must determine the question. No right of the complainant, under the laws or the Constitution of the United States, by its exclusion from the state, is infringed and this is what the state now accomplishes."

To the same effect is *Security Mutual Life Insurance Company* v. *Prewitt*, 202 U. S. 246.

On the application of the Thermiodyne Radio Corporation for the right to transact its business in the State of New York it agreed to comply with the statutory provisions respecting license fee and to pay to the state, as all similar corporations were obliged to do, six cents for every share of no par value stock used by it in the State of New York. Were this immediately ascertainable, as in the case of domestic corporations, the payment would have been at once exacted. But the proportionate part of such class of stock liable to the license fee could not be ascertained until after the company had transacted its business for a year. Its agreement, however, to pay the statutory amount was a present covenant made at the time of and in consideration of the issuance of the authority to do business in the State of New York. Whatever constitutional objection existed was waived by the corporation. Having agreed to the conditions as the price of admission, it could not thereafter after being admitted, turn around and dispute them. Whether the condition be regarded as precedent or subsequent, the waiver of any objection to the condition is complete

when the corporation assented thereto by receiving the privilege of being able to conduct its business, as granted by the State.

In *Ashley* v. *Ryan*, 153 U. S. 436, 443, Mr. Justice White stated:

> "It follows from these principles that a State in granting a corporate privilege to its own citizens, or, what is equivalent thereto, in permitting a foreign corporation to become one of the constituent elements of a consolidated corporation organized under its laws, may impose such conditions as it deems proper, and that the acceptance of the franchise in either case implies a submission to the conditions without which the franchise could not have been obtained. In *Paul* v. *Virginia*, *supra*, the court said, p. 181: 'Having no absolute right or recognition in other states, but depending for such recognition and enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose.'"

In accord is *Hooper* v. *California*, 155 U. S. 648, in which the opinion contains a collation of the authorities.

POINT IV

The case of *Air Way Co.* v. *Day*, 266 U. S. 71, upon the authority of which the district court decided this case adversely to the appellants, is not controlling.

The authority was an action brought against state officers of Ohio to restrain the collection of a franchise tax charged against the Air-Way Electric Appliance Corporation for the privilege of exercising its corporate franchise in Ohio during the year commencing July 1st, 1921, on the grounds that the legislation of

Ohio, under which the charge was imposed, was invalid under the commerce clause of the constitution and was repugnant to the Fourteenth Amendment.

Plaintiff was a Delaware corporation. Under its certificate of incorporation and the laws of that state, its authorized capital stock was 400,000 shares without par value, of which 200,000 shares were common stock and 200,000 shares founders' stock. Shortly after its incorporation, it obtained from the secretary of state, in conformity with the laws of Ohio, a certificate of admission to do business in that state, and also paid the initial fee for the privilege of there exercising its corporate franchise.

Under Act of May 14th, 1921 (109 Ohio Laws, p. 277), it was provided:

> "The amount of fees payable by a foreign corporation, having common stock without par value * * * shall be five cents per share upon the proportion of the number of shares of authorized capital stock, represented by property owned and used and business transacted in this state."

Plaintiff's report to the tax commission stated that the amount of business transacted in Ohio in the year ending July 1st, 1920, was $250,594.58, whereas that figure represented its total sales, of which only $70,802.30, or about 28%, was intrastate, and the balance, $179,792.28, or about 72%, was interstate. The state officers, assuming that all plaintiff's property and business was located and transacted in Ohio, made no apportionment between local and interstate business, and fixed the annual franchise tax at five cents per share on its total authorized stock.

The Supreme Court held that the assessment by the Ohio officials on interstate commerce was unauthorized by the Federal constitution, and that a franchise

tax assessment on all authorized capital stock, whether issued or not, was unauthorized.

Several material points of distinction from the instant case are suggested by the above recital of facts.

The nature of the tax obligations are different. The Air-Way case involved a franchise tax, not a license fee. A franchise tax must be based on property valuation, not upon an arbitrary assessment of so much per share without referring to property and assets in the assessing state. In this respect the law of the State of New York, in the assessing of franchise taxes, does not have an arbitrary rate of assessment, but under Section 182 of the Tax Law of the State of New York, such assessment is based upon report of assets and business transacted. The distinction between franchise taxes and license fees for permission to do business in the State is exhaustively treated in *People* v. *Sohmer*, 148 App. Div. 514 (affd. on opinion below in 206 N. Y. 634). Under this authority, the provisions relating to an organization tax of a corporation and the license fees are distinct, separate matters from franchise taxes, which depend for the amount upon business subsequently transacted. The same distinction was observed by the Federal Court in *Sweet* v. *The All Package Grocery Stores Co.*, 262 Fed. Rep. 727 (affd. by the U. S. Supreme Court under the designation of *Marshall* v. *The People of the State of New York*, 254 U. S. 380).

No interstate commerce is involved in the instant case, removing that feature of the Air-Way case from consideration.

Furthermore the Ohio statute based the tax on *authorized* capital stock, whereas the tax in the present case is based upon issued capital stock. The fact that "authorized" shares were made the basis of taxation was the principal ground of criticism of the

Supreme Court. This was subsequently so stated in *Roberts & Schaefer* v. *Emmerson*, 271 U. S. 50, wherein Mr. Justice Stone stated:

> "The authority to issue its capital stock was a privilege conferred by another state, and bore no relation to any franchise granted to it by the state of Ohio, or to its business and property within that state. When authorized capital stock is taken as the basis of the tax, variations in the amount of the tax are obtained, according as the corporation has a large or small amount of unissued capital stock. This was held, in the Air-Way case, to be an unconstitutional discrimination, since it resulted in a tax larger than the tax imposed on other corporations with like privileges and like business and property within the state, but with a smaller capital authorized under the laws of the state of their creation."

In the instant case, the license fee was not based on authorized capital stock but on a properly ascertained proportion of issued non-par value stock employed in the State of New York.

POINT V

The determination of the amount of the license tax rests in the uncontrolled discretion of the State of New York.

In *People ex rel. U. S. A. P. P. Co.* v. *Knight*, 174 N. Y. 475, the nature of organization taxes upon domestic corporations, to which the taxes in the instant case are assimilated, was considered, and the Court of Appeals held that such taxes, although in the nature of license fees for the right to assume corporate existence, were a part of the taxing system of the State of New York, and that it was a sound doctrine to hold that the State, in granting a franchise to a corpora-

tion, may limit the powers to be exercised under it and annex conditions to its enjoyment and make it contribute to the revenue of the State.

> "If the grantee accepts the boon, it must assume the burden."

The Court further held there was no distinction in the policy of the State of New York in taxing domestic and foreign corporations, stating per Vann, J., p. 484:

> "In the instance of a foreign corporation, it is not its franchise that is taxed, because it is not subject to the laws of this state, but it is that intangible property which rests solely in the privilege allowed it of exercising its franchise within the State upon which the tax is levied."

The tax in the instant case is analogous to that construed in *Home Insurance Co.* v. *N. Y.*, 134 U. S. 594, where the tax was construed as being on the corporate franchise or business of the company and reference is only made to its capital stock and dividends for the purpose of determining the amount of the tax, and it was held that no constitutional objections lie in the way of a legislature prescribing any mode of measurement to determine the amount it would charge for the privilege it bestows.

Mr. Justice Fields, stated, page 599:—

> "The right or privilege to be a corporation, or to do business as such body, is one generally deemed of value to the corporators, or it would not be sought in such numbers as at present. * * * The granting of such right or privilege rests entirely in the discretion of the state, and, of course, when granted, may be accompanied with such conditions as its legislature may judge

most befitting to its interests and policy. * * * No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows. * * * It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the state; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction. It is true, as was said by this Court in *California* v. *Pacific Railroad Company*, 127 U. S. 1, 41, that the taxation of a corporate franchise has no limitation but the discretion of the taxing power, and its value is not measured like that of property, but it may be fixed at any sum that the legislature may choose; it may be arbitrarily laid, without any valuation put upon the franchise. If any hardship or oppression is created by the amount exacted, the remedy must be sought by appeal to the Legislature of the State; it cannot be furnished by the federal tribunals. * * * From the very nature of the tax being laid upon a franchise given by the State, and revocable at pleasure, it cannot be affected in any way by the character of the property in which its capital stock is invested. The power of the State over the corporate franchise and the conditions upon which it shall be exercised, is as ample and plenary in the one case as in the other."

What is taxed is the privilege conferred to exercise a foreign franchise in the State of New York, a privilege which the state had the absolute right to withhold, and, when granted, could be subject to such conditions as the legislature sought fit to impose. The

tax was at a specified rate multiplied by the number of shares of non-par value stock employed in the State of New York. The charge was a fixed and determinable obligation, which, when the number of such shares was ascertainable after a year's operation under the license granted, accrued an obligation which the corporation assumed when it applied for and received the right to do business. It was a tax laid without reference to the character of the property in which the corporate capital stock was invested, said property being only taken cognizance of to make a proper apportionment of the stock for the purpose of determining the amount of the tax to be paid. Similarly, as in *Society for Savings* v. *Coite*, 6 Wall. 594, where the court held that the deposits of a savings bank were not taxed where the amount of such deposits was only considered for the purpose of determining the amount to be paid for the franchise conferred,

> "Reference is evidently made to the total amount of deposits on the day named, not as the subject matter of assessment, but as the basis for computing the tax required to be paid by the corporation defendants."

In *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217, the Court stated, in referring to a privilege tax for operating a railroad levied against a foreign corporation, page 229:—

> "There is no levy by the statute on the receipts themselves, either in form or fact; they constitute, as said above, the means of ascertaining the privilege conferred."

or, as stated in *Pollock* v. *Farmers' Loan and Trust Company*, 157 U. S. 429, 576, "a charge for a privilege, or in the transaction of business, without any necessary reference to the amount of property belonging to

those on whom the charge might fall, although it might be increased or diminished by the extent to which the privilege was exercised or the business done." In the instant case it could not be increased, the maximum being determined by the total amount of non-par value stock, if the entire amount thereof was employed in the State of New York. It could be reduced from a maximum calculable when the license was granted, by failure to employ the entire amount of such stock authorized in the State of New York during the first year of operation.

POINT VI

No discrimination between foreign corporations liable to the payment of the license fee existed.

In the instant case all foreign corporations having stock of no par value are obliged to pay six cents for each share of such character of stock employed in its business in the State of New York, as a single privilege or license tax. Under these circumstances no violation of any of the provisions of the Fourteenth Amendment can occur. As stated in *Home Insurance Company* v. *New York*, 134 U. S. 594, 607:—

> "There is the same rule applicable to all under the same conditions in determining the rate of taxation. There is no discrimination in favor of one against another of the same class."

All foreign corporations were required to pay a license fee or tax of six cents for every share of non-par value stock employed in the State of New York. The tax was a uniform one based on number of shares, not on property represented thereby. No tax is sought to be imposed on the property of the corporations affected. As was aptly said by Mr. Justice Shiras, in *New York State* v. *Roberts*, 171 U. S. 658-664:

> "From the very nature of the tax, it being laid

as a tax upon the franchise of doing business as a corporation, it cannot be affected in any way by the character of the property in which its capital stock is invested."

As Mr. Justice Brewer stated in *Michigan Central Railroad* v. *Powers*, 201 U. S. 245, 293:—

"There can at this time be no question, after the frequent and uniform expressions of the Federal Supreme Court, that it was not designed by the Fourteenth Amendment to the Constitution to prevent a State from changing its system of taxation in all proper and reasonable ways, nor to compel the States to adopt an ironclad rule of equality, to prevent the classification of property for the purposes of taxation, or the imposition of different rates upon different classes. It is enough that there is no discrimination in favor of one as against another of the same class, and the method for the assessment and the collection of the tax is not inconsistent with natural justice."

As a necessary colloquy it follows, as stated by Mr. Justice Harlan in *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114, 123:—

"And when such legislation applies to artificial bodies, it is not open to objection if all such bodies are treated alike under similar circumstances and conditions, in respect to the privileges conferred upon them and the liabilities to which they are subjected. Under the statute of New York, all corporations, joint stock companies and associations of the same kind are subject to the same tax. There is the same rule applicable to all under the same conditions in determining the rate of taxation. There is no discrimination in favor of one against another *of the same class.*"

Where it is apparent that the tax was not levied on property, but a flat rate on proportion of capital stock employed, there can exist no discrimination provided all similar stock of corporations equally situated are taxed at the same rate. Classification of that intended to furnish the basis of taxation is within the competency of the legislature. *Citizens' Telephone Co.* v. *Fuller*, 229 U. S. 322.

The license fee was an entirely reasonable provision enacted to protect domestic corporations organized under the corporation laws of the State of New York. Such domestic corporations were required to pay, as part of the organization tax, five cents for each share of no par value stock authorized. The rate for foreign corporations was six cents. The tax bore equally on all foreign corporations. *People ex rel. Terminal and Town Taxi Corporation* v. *Walsh*, 202 N. Y. App. Div. 651, 656. This license fee, as stated in *People ex rel. Elliott-Fischer Co.* v. *Sohmer*, 148 N. Y. App. Div. 514, "Originated in an independent statute designed for a special purpose and complete in itself." As a tax on stock, similar in nature to a stamp impost, it applied equally to all foreign corporations having no par value stock. No possible discrimination could therefore exist.

In *Roberts* v. *Emmerson*, 271 U. S. 56, affirming the Illinois statute imposing a tax at a flat rate per share on stock of no par value, this Court answered the question as to any possible discrimination between that class of stock and par value stock, as follows:

> "These differences, both in the legal incidents and in the practical uses of the two classes of stock, not only are a basis for classification of them for the purpose of taxation, but make unavoidable certain differences in the method of assessing the tax. Authorized capital stock cannot well be used as the measure of a tax unless some

arbitrary value is assigned to the no par value shares, for they may be issued from time to time at varying prices, and, until issued, they cannot have any value. To require the stock to be issued at a value fixed in advance of its issue, and to make that value the basis of the tax, would in effect abolish no par value stock. Because of the essential differences between the two kinds of stock, it is difficult to conceive of any other method of assessing the tax which would save the character of no par value stock and not result in similar inequalities. The inequalities complained of result from a classification which, being founded upon real differences, is not unreasonable, and the discrimination which results from it is not arbitrary or prohibited by the Fourteenth Amendment. It is enough that the classification is reasonably founded upon or related to some permissible policy of taxation. (*Watson* v. *State Comptroller*, 254 U. S. 122; *Pacific Express Company* v. *Seibert*, 142 U. S. 339; *American Sugar Refining Company* v. *Louisiana*, 179 U. S. 89; *Clement National Bank* v. *Vermont*, 231 U. S. 120."

This decision was subsequently reaffirmed by this Court in *Margay Oil Corporation* v. *Applegate*, 273 U. S. 666, affirming 167 Ark. 614, holding that a statute of Arkansas fixing the value of non-par stock of foreign corporations at $25 per share for excise purposes did not violate the provisions of the Constitution, the State having the power to prescribe the method of ascertaining the value of a franchise and imposing a tax upon that basis.

In *American Uniform Co.* v. *Commonwealth*, 237 Mass. 42, the excise statute under consideration provided that corporations whose stock is issued without par value, shall pay on the basis of par value of $100

per share for said character of stock. The petitioner, a foreign corporation, contended that the actual value of its non-par value stock was not in excess of $10 per share and that the Tax Commissioner refused to receive evidence of actual value, but assessed the tax in accordance with the statute quoted. In holding the statute constitutional, Ruggs, Ch. J., for the Court, stated, page 44:—

> "Under the Federal and State Constitutions, the transaction of local business within this Commonwealth by foreign corporations is a privilege which may be granted or denied by the Commonwealth. If the sovereignty confers the gift, it may fix its own terms, provided they are not contrary to the Constitution. A fixed excise of $2,000, doubtless might be charged each foreign corporation for the privilege of doing here a local business without violating any right guaranteed by the Constitution of the United States. This is the maximum amount of the excise under any circumstances, no matter how large the capital. The excise simply is measured by the par value of the shares up to that fixed maximum. Before the enactment of St. 198, C. 235, as well as since, the actual value of the market value of the shares has been of no consequence, whatsoever. Two foreign corporations, each of the same amount of capital stock, at par, one on the verge of bankruptcy and its stock valueless both in truth and on the market, and the other highly prosperous and its stock both in truth and on the market worth double its par value, would pay the same excise under the law. The reason for this is that the tax is an excise and not a property tax. It stands on the same footing, in this respect in principal as most license taxes."

After a most learned discussion of the character of no-par value stock and the reason for making an arbitrary excise valuation and tax, the opinion concludes (page 46):

> "The present statute applies evenly to all foreign corporations seeking to avail themselves of the privilege of doing a domestic business within the borders of Massachusetts, and having capital stock without par value. • • • The petitioner is not singled out as a special object for hostile or discriminating legislation. • • • It cannot be said that this statute is unequal in its operation or that it deprives the plaintiff of its property without due process of law."

The Supreme Court of the State of Missouri, as late as February, 1928, decided in *State* v. *Pierce Petroleum Corporation*, 2 S. W.—2nd Series—790 that a franchise tax payable by a foreign corporation may be computed according to any method prescribed by the legislature, being an excise upon transacting business, and the method need not consider the value of the privilege. Ragland, J., in the opinion, stated:—

> "The tax is not a property tax, but an excise levied upon the privilege of doing business in this state as a corporation. (*State* v. *Tax Commission*, 282 Mo. 213.) It may therefore be computed according to any method the legislature sees fit to adopt. That method may or may not take into consideration the value of the privilege taxed. It is only necessary that the resulting tax be not obnoxious to the constitutional requirement of uniformity and equality. And these requirements are fully satisfied if the statute imposing the tax applies equally to all corporations in like conditions, and makes a reasonable and not a purely arbitrary classification."

After reviewing *Roberts & Schaefer Co.* v. *Emmerson*, 271 U. S. 50; *American Uniform Co.* v. *Commonwealth*, 237 Mass. 42 and *State* v. *Margay Oil Corporation*, 167 Ark. 614, the opinion continued:—

> "The method provided by the statute is one of convenience and one which the legislature, in its discretion, had the right to prescribe."

With the right of the State to classify no par value stock in a separate category from par value stock, for the purpose of taxation, it follows that the license fee of six cents per share of each share of no par value stock used by a foreign corporation in the State of New York was within the constitutional power of the State, not rendered discriminatory because of a different method of computing the license fee from stock of par value. And not being a tax on property, but applying solely to the stock itself, it operated equally in respect to all foreign corporations employing that species of stock. (See *Detroit Mortgage Corporation* v. *Vaughan*, 211 Mich. 320; *American Uniform Co.* v. *Commonwealth*, 237 Mass. 42.)

POINT VII

Section 181 of the New York State Tax Law, as applicable to this case, is constitutional.

This was directly determined by the New York Court of Appeals in *People ex rel. Griffith* v. *Loughman*, 249 N. Y. 369; Official Edition Advance Sheets Dec. 29, 1928.

The decision in that case is so comprehensive and illuminating that, for the convenience of this Court, it is printed at length as an appendix to this brief.

POINT VIII

The claim of the State of New York should be allowed in full as a preferred claim.

Being a valid claim due and owing to the State, its preferential right of payment follows. (*Marshall* v. *New York*, 254 U. S. 380.)

CONCLUSION

The judgment appealed from should be reversed, with costs, and the case remanded to the United States Circuit Court of Appeals for the third circuit for further proceedings, in accordance with the opinion of this court, allowing the claim of the State of New York, for license fee, in the sum of $15,000, with interest at 6% per annum from November 13th, 1925, to date of payment as a preferred claim, and directing the trustees to pay the same accordingly.

Respectfully submitted,

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APPENDIX

COURT OF APPEALS

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.*, D. W. GRIFFITH, INC., *Relator-Respondents,*

against

MICHAEL F. LOUGHMAN, JOHN J. MERRILL and MARK GRAVES, constituting the State Tax Commission, *Respondent-Appellants.*

Appeal by State Tax Commission from an order of the Appellate Division, Third Department, annulling, on certiorari, a determination of the Tax Commission and remitting matter to the Commission for further action per opinion.

WENDELL P. BROWN, for Appellants.

E. CROSBY KINDLEBERGER, for Respondents.

Lehman, J.

The relator, D. W. Griffith, Inc., is a corporation organized under the laws of the State of Maryland. In July, 1920, it applied to the Secretary of State of New York for permission to do business in this State. Its authorized capital stock consisted of 500,000 shares of no par value.

At the time the relator began to do business in this State, the Tax Law (Section 181) provided: "Every foreign corporation • • • doing business in this

State shall pay to the state treasurer, for the use of the state, a license fee of one-eighth of one per centum for the privilege of exercising its corporate franchises or carrying on its business in this state, to be computed upon the basis of the capital stock employed by it within this state during the first year of carrying on its business in this state, which first payment shall not be less than ten dollars, and if in any year thereafter any such corporation shall employ more than eight thousand dollars of its capital stock within this state on which a license fee has not been paid, then a license fee at the rate of one per centum shall be due and payable upon any such increase. The measure of the amount of capital stock employed in this state shall be such portion of the issued capital stock as the gross assets employed in any business within this state bear to the gross assets wherever employed in business. * * * No action shall be maintained or recovery had in any of the courts in this state by such foreign corporation after thirteen months from the time of beginning such business within the state, without obtaining a receipt from the comptroller for the payment of the license fee upon the capital stock * * *."

In *People ex rel. Elliott-Fisher Co.* v. *Sohmer*, 140 A. D. 515, affirmed 206 N. Y. 634, it was held that "the clear intention of the legislature was that this tax should be based upon the par value of the capital stock which is employed in business in the State." At the time the relator began to do business within the State, the statute did not expressly provide any measure for capital stock which had no par value. In *People ex rel. Terminal and Town Taxi Corp.* v. *Walsh*, 202 A. D. 651, the Appellate Division held that in such circumstances the tax must be based upon the actual capital of relator within this State.

The omission in the statute was supplied by an amendment to Section 181 of the Tax Law which took effect on May 12th, 1921, or about ten months after the relator began to do business in this State. "On the issued capital stock of any corporation issuing shares without designated monetary value, such corporation shall pay for the use of the state a license fee of six cents on each such share employed in this state as hereinafter provided." At the close of the first year of carrying on business within this State, the tax or license fee payable by the corporation has been fixed at six cents on each share of its capital stock employed in this State. The tax so fixed is much greater than it would have been if based upon the actual capital of the relator within this State in accordance with the practice which prevailed before the amendment of the statute; and the relator attacks the assessment on the ground that the amendment is unconstitutional, and that in any event it should not be construed as applying to corporations which had begun to do business in this State under certificate of permission issued by the Secretary of State before the amendment took effect.

There can be no doubt that the method of taxation embodied in the amended statute must result in some inequalities, corporations with stock having no par value are taxed on a basis entirely different from the tax assessed against corporations which have issued stock with a par value. The number of shares of capital stock having no par value bears no relation of any kind to the actual capital or business of the corporation. It can form, it is said, no legitimate basis for the imposition of a license tax upon a foreign corporation. Such considerations are clearly not without weight, and have led not only the court below but the Circuit Court of Appeals (Third Division) to hold the amendment unconstitutional, relying on the authority of *Air-*

Way Corporation v. *Day*, 262 U. S. 71. *Matter of Thermiodyne Co.*, 26 Fed. (2d) 713, affirmed October 31st, 1928 "on opinion of Judge Morris below." See also *People ex rel. Terminal & Town Taxi Corporation* v. *Walsh, supra*. We have reached the opposite conclusion in spite of the inequalities that may be produced by the tax.

The relator is a foreign corporation. The Legislature might have excluded it from the State. It chose to admit it upon condition that it pay a license fee or tax, just as a domestic corporation must pay a similar organization tax before it receives from the State corporate powers. The power of the State to impose upon a foreign corporation a license fee or tax as a condition precedent to its entry into the State is, from its nature, less subject to constitutional limitations than the power to impose a franchise tax as payment or compensation for the privilege of continuing to do business here. Different tests must be applied to determine the validity of attempted exercise of such powers. *Hanover Insurance Company* v. *Harding*, 272 U. S. 494. At least, in the former case, there need not be equality between domestic and foreign corporations.

Here, though the tax is called a "license" tax in the statute, it cannot be measured until one year after the corporation has received a certificate of authority to do business in the State, and payment is necessarily postponed until after that time. In strict sense, such payment is not a condition precedent to the entry of the corporation into the State. For that reason, in *Matter of Thermiodyne Co., supra*, the court held that the validity of the tax must be tested as if it were a "franchise" rather than a license tax. The test of the validity of the tax must be determined "by its substance—its essential and practical operation—rather

than its form and local characterizations." *International Paper Co.* v. *Massachusetts*, 244 U. S. 135. The State has admitted the relator subject to the condition that the corporation pay a license fee, just as a domestic corporation must pay an organization tax before it has any power to act. The measure of the tax adopted by the Legislature required postponement of the tax bill a year after the corporation began to do business. Only in that sense is such payment a condition subsequent. The obligation to pay arose when the corporation began to do business in the State, and the effect of failure to meet that obligation results not merely in the revocation of authority previously granted by the State to do business here, but acts as a bar to enforcement, within the State of contracts made in the course of such business. Essentially the tax constitutes the payment exacted for the privilege of entering into the State, even though in some particulars it is analogous to a franchise tax.

We have analyzed the essentials of the tax and its practical operation to indicate the question presented in this case. Authority is not lacking that the Legislature might have adopted the same measure as a basis even for a franchise tax. We are not called upon to define the extent of the legislative power beyond the limits of its exercise in this case. We do not attempt to determine whether the Legislature might have gone further.

In *Air-Way Corp.* v. *Day*, *supra*, the Supreme Court of the United States held that "the mere number of authorized non-par value shares is not a reasonable basis for the classification of foreign corporations for the purpose of determining the amount of the annual fee to be paid to a State for the privilege of doing business therein." The court pointed out several objections to the tax. "The inevitable effect of the act is to

tax and directly burden interstate commerce of foreign corporations permitted to do business in Ohio and engaged in interstate commerce, wherever the number of shares authorized, subject to the charge of five cents each, exceeds the number of outstanding shares attributable to or represented by the corporation's property and business in that State. * * * Plainly the fee, to the extent that it is based on a number of shares in excess of those outstanding, has no relation to what was paid in for the stock or to its value or to the amount of plaintiff's capital, its property or its business, intrastate or interstate. The act in its practical operation does not require like fees for equal privileges held by foreign corporations in Ohio under the same circumstances."

It is clear that neither of these objections can have any application in this case. The basis of the tax here is not the mere number of *authorized* shares of stock, but the number of *issued* shares of stock *used in this State*. There is therefore no direct burden on interstate commerce, even if such an objection could be raised to a tax exacted for the privilege accorded to a foreign corporation to enter the State. *Hanover Insurance Company* v. *Harding, supra*. Though the court does advert in its opinion to the circumstance that the number of non-par value shares of a corporation constitute no representation as to and has no relation to the amount of its capital, yet the fee or tax in that case was held unconstitutional, not because of that circumstance, but because it was based "on a number of shares in excess of those outstanding." The question of whether a State might impose a privilege tax on a corporation based, as here, upon the number of its issued shares of non-par stock or the proportion used in the State, was still left open.

That question was definitely decided in *Roberts & Schaefer Co.* v. *Emmerson*, 271 U. S. 50. There the State

of Illinois imposed a franchise tax, on domestic corporations having no par value stock, upon the basis of the number of authorized shares of its capital stock which the Legislature declared "shall be considered to be of the par value of $100 per share." The court pointed out that the Air-Way case merely decided that such a tax imposed by the State of Ohio on a foreign corporation was invalid because the corporation's "authority to issue its capital stock was a privilege conferred by another State, and bore no relation to any franchise granted to it by the State of Ohio or to its business and property within that State." Those objections do not apply to a tax imposed by the State from which the corporation derives its authority to issue stock. It may impose a franchise tax based upon the authorized corporate stock, whether issued or not.

Even so, the objection still remained that a "flat rate per share on no-par value stock, regardless of its value," may produce such inequalities as to result in "an unreasonable and discriminatory classification in which no-par value stock is placed in one class and taxed at an arbitrary valuation * * * while par value stock is placed in another class and taxed at the value at which it is authorized to be issued." The Court held that in spite of such inequalities the classification was reasonable. It pointed out that "because of the essential differences between the two kinds of stock, it is difficult to conceive of any other method of assessing the tax which would save the character of no-par value stock and not result in similar inequalities" unless the State should choose to abandon entirely its system of measuring the franchise tax payable by the par value of authorized corporate stock.

It would seem that for the same reasons a similar classification is reasonable where a tax on foreign corporations is measured by the number of issued shares of their capital stock or the proportion used in the

State, and in the case of *Margay Oil Corporation* v. *Applegate*, 273 U. S. 666, the court so held without opinion "on authority of *Roberts & Schaefer Co.* v. *Emmerson*, 271 U. S. 50." The facts in that case are stated in the opinion of the State court in the same case (269 Southwestern 66). We find no distinction in principle between the classification adopted by the State of Arkansas and there sustained, and the classification which is challenged in the case now under consideration. For these reasons we hold that the statute is not unconstitutional, at least as applied to foreign corporations who after it became effective have entered the State and begun to do business here.

The question of whether the legislature intended to make the amendment apply to corporations which had already begun to do business under certificate of authority issued by the Secretary of State, and, perhaps even whether the Legislature could give effect to such intention, if it had it, is not free from doubt. We hold that under a fair construction of the amendment, the Legislature intended the amendment to apply only to corporations which thereafter begun to do business or which became obligated to pay an additional tax because in any year after the amendment became effective it employed additional taxable capital stock in the State.

We have pointed out that the payment of the tax is imposed for the privilege of entering into the State. Though it is lawful to begin to do business in the State without its payment, the Legislature has declared in effect that non-payment of the tax thereafter shall result in the withdrawal of the sanction previously given to do business here, even insofar as concerns business already done. The foreign corporation, having begun to do business, may not escape its obligation to pay the tax by subsequent withdrawal from the State. Though we assume that the Legislature has

power to change the tax at any time before the tax is assessed, yet a change in the tax might result in placing the foreign corporation, which has acted upon the sanction conditionally given in so unfair a position that the intention to make a change apply to such corporations should not be imputed to the Legislature. We may disregard inequality in the incidence of a tax between corporations having stock, with a par value and those having stock without par value, and even among corporations having stock without par value where that inequality is the result of a reasonable classification. If we construe the statute as intended to apply to corporations which had already obtained a conditional sanction to do business in the State, then this relator is subjected to inequality by reason of an unexpected change in conditions under which such sanction was offered and accepted. The measure of the obligation is changed after the obligation has been assumed. The circumstance that liability to pay an increased tax is based upon a transaction already completed might, indeed, raise doubt as to the power of the State to impose such liability. The statute should be construed in such manner as to free it from such doubt. The State should not be subjected to a justified charge of unfairness. "The general principle 'that the laws are not to be considered as applying to cases which arose before their passage' is preserved, when to disregard it would be to impose an unexpected liability that if known might have induced those concerned to avoid it and to use their money in other ways." *Llewellyn* v. *Frick*, 268 U. S. 238. See also *Blodgett* v. *Holden*, 275 U. S. 142; *Untermyer* v. *Blodgett*, 48 Supreme Court, 353.

It is said that if we exclude from the scope of the amendment the obligation of the relator to pay a tax "to be computed upon the basis of the capital stock

employed by it during the first year of carrying on its business in this State" we must likewise exclude from the scope of the amendment the additional tax which a foreign corporation already doing business in the State must pay "if in any year thereafter any such corporation shall employ more than eight thousand dollars of its capital stock within this State on which a license fee has not been paid." That, we think, does not follow.

The obligation to pay the additional license fee or tax will arise only when and if the foreign corporation chooses to employ additional capital in the State in any year after the amendment became effective. It is a future obligation dependent upon future acts within the power of the corporation to control, and as to that tax all foreign corporations which have received authority to do business here, and which have stock without par value, are treated in the same way. It is, too, essentially a different kind of tax from the tax payable at the end of the first year, in which the corporation has done business here. Payment of the additional tax is, perhaps, like payment of a franchise tax, a condition subsequent to continuing to do business here; but non-payment does not render contracts previously made in the course of business unenforceable in our courts. None of the arguments which lead to the conclusion that the Legislature did not intend to change, even if it could, the measure of a tax where the obligation to pay has already arisen though the time for its measurement and payment has not arrived, apply with force to an additional tax or fee which becomes payable because in any year after the amendment became effective, the corporation chooses to employ within the State additional capital.

For these reasons the order is affirmed with costs.

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Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK,
Appellants,

AGAINST

GAMBLE LATROBE, JR., JAMES B. KNOWLES and WILLIAM S. EICHS, trustees in bankruptcy of THERMIODYNE RADIO CORPORATION,
Appellees.

October Term,
A. D. 1928.
No. 601.

APPELLEES' BRIEF.

Statement.

The following facts, not stated in the appellants' brief, are deemed material:

The bankrupt was engaged in the manufacture and sale of radio receiving sets. It owned and operated a factory in the State of New York, from which it shipped its products to customers without the State. It also had offices at Chicago and San Francisco (R. p. 13). All of its assets, however, were reported to the State Tax Department as being segregated to New York State only (R. pp. 19-20). The percentage of sales made to customers without the State of goods

manufactured within the State does not appear in the record, since interstate business of that character was not a factor in the determination of assets to be "segregated" to New York for the purposes of either the "license fee" or the annual "franchise tax" and was, therefore, not called for in the form of annual report required of the bankrupt (R. p. 13). That report on its face showed that the information therein was to be used in determining the "license fee" under § 181 of the *Tax Law* (R. pp. 18, 20).

While the number of issued shares was 250,000, the amount paid in on them was only $580,000 (R. p. 14) or an average of $2.32 per share; and the average value of the tangible assets, including receivables and cash, was only $280,000 (R. p. 18) or about $1.12 per share. The intangible assets, patents and good will, were of no value, as appears from the fact that the corporation at all times operated at a loss (R. p. 12). Some of the shares were issued at $7.25 per share (R. p. 13) and traded in at 6½ to 22½ (R. p. 20), but presumably these were manipulated prices, as the public issue was floated by a brokerage house and the remaining shares, being almost 80% of the total, were withheld from the market (R. p. 13).

The bankrupt, at about the time of beginning business in the State of New York, received a certificate of authority from the Secretary of State pursuant to *Stock Corporation Law*, §§ 110-111 (R. p. 28).* Those sections, the complete text of § 181 of the *Tax Law*, of which only an extract is printed in the appellants' brief, and parts of §§ 197, 209, 211 and 214 of the *Tax Law*, all as in force in November, 1924, will be found in the Appendix.

* The record, as well as the opinion of the District Court, inadvertently refers to the certificate as issuing under *General Corporation Law*, §§ 15-16. The provisions intended to be referred to, however, were at the time in question §§ 110-111 of the *Stock Corporation Law*. Prior to that time they had been part of the *General Corporation Law*, and since then they have again been enacted as part of that statute. The error is of no importance.

Summary of the Argument.

I. The tax was discriminatory as against the bankrupt and in favor of other foreign corporations enjoying equal privileges in the State.

II. The attempted classification of foreign corporations according to the number of issued shares of non-par stock was not justified by reasons either of convenience or of usage.

III. In the case of foreign corporations having non-par stock there was no relation between the amount of the tax and the value of the privilege conferred by the State.

IV. The real basis of decision in *Air-Way Electric Appliance Corporation* v. *Day*, 266 U. S. 71, is controlling here.

V. The principle of *Roberts & Schaefer Co.* v. *Emmerson*, 271 U. S. 50, is not applicable to a tax based on the issued stock of foreign corporations, and should not have been followed in the *Maxpay Oil* and *Gilliland Oil Cases*.

VI. The tax, even if it is the price of admission to the State, may be impugned under the Equality Clause of the Fourteenth Amendment.

VII. The attitude of this Court toward the arbitrary taxation of foreign corporations having non-par stock is of national importance.

VIII. The judgment appealed from should be modified so as to direct the reduction of the State's claim to $725 and interest.

POINT I.

The tax was discriminatory as against the bankrupt and in favor of other foreign corporations enjoying equal privileges in the State.

The following examples suffice to illustrate the discriminatory nature of the tax as applied to the bankrupt:

(1) Corporation A, organized under the laws of Delaware, receives authority to do business in the State of New York. It issues 250,000 shares of stock of the par value of $2.50 each, in payment for which it acquires real and personal property, all segregated to the State of New York, of the actual value of $580,000. It engages in business similar to that of the bankrupt. At the end of the first year of its doing business in the State, there is due from it under the provisions of *Tax Law*, § 181 a "license fee" equal to one-eighth of one per cent. of its "capital stock" (held in *People* v. *Sohmer*, 148 App. Div. 514, aff'd 206 N. Y. 634, to mean the par value of the stock and not the actual value of the assets of the foreign corporation), that is to say, $781.25.

(2) Corporation B, a Delaware corporation, doing business in New York similar to that of the bankrupt, has issued 250,000 shares of non-par stock at $100 per share, and has invested the proceeds, $25,000,000, in assets "segregated" to New York. Its "license fee" is $15,000.

(3) Corporation C, a Delaware corporation, doing business in New York similar to that of the bankrupt, has issued 250,000 shares of non-par stock at $23.20 per

share, and has invested the proceeds in assets one-tenth of which, or $580,000, are "segregated" to the State of New York. Its "license fee" is $1,500.

In the first case, a foreign corporation employing in the State of New York the same amount of assets as the bankrupt, pays a fee only about one-twentieth in amount to that demanded of the bankrupt. In the second case, a corporation employing in the State assets about forty-three times greater in value than the bankrupt's, pays only the same fee. In the third case, a corporation employing in the State assets of an equal value to those of the bankrupt, pays a fee one-tenth in amount.

The law imposing a tax on foreign corporations for the privilege of doing business in the State, to be computed upon the basis of the "capital stock" employed within the State, payable after the close of the first year (*Tax Law*, §§ 181, 197) effects a classification of corporations doing business in New York into domestic and foreign corporations, which in view of the different nature of the respective privileges granted to the two classes by the State of New York is a proper one. But the legislature has further classified foreign corporations into those having stock with par value and those having non-par stock, and has still further classified corporations having non-par stock according to the number of shares into which that stock happens to be divided.

The characteristic feature of non-par stock is that neither by the number of its shares nor in any other manner does it indicate the amount paid in or the value of the assets represented. Under the Delaware statute full paid shares of non-par stock may be issued from time to time for such consideration as may be fixed from time to time by the board of directors (*Revised Code of Delaware*, c. 65, sec. 14, as amended).

On the other hand, par value is a representation, not necessarily accurate but at least approximate, as to the amount originally paid in or remaining payable upon the stock,

particularly in States such as Delaware where the payment of par value in money or money's worth is required, under penalty of stockholders' liability for the corporate debts.

Constitution of Delaware 1897, Art. IX, Sec. 3;
Revised Code of Delaware, c. 65, secs. 14, 20;
DuPont v. *Ball*, 11 Del. Ch. 430.

It may, therefore, reasonably be assumed that a Delaware corporation having par value stock employs resources approximately equal to the par amount of the issued stock, and on that amount it is required to pay to the State of New York ⅛ of 1% for the privilege of employing such resources in New York. But a Delaware corporation having non-par stock for a similar privilege is required to pay an amount computed without reference to the amount or value of its assets or of the property paid in on its stock, but determined merely by the number of shares into which the non-par stock happens to be divided. Such classification is one according not to quality, but to accident.

> "• • • a tax on farms according to the number of fields into which they are divided would not be valid. Such a classification would not treat all in the same class alike, and would impose a heavier burden upon one farm than upon another of the same size, situation and value."
>
> *P. ex rel. Farrington* v. *Meusching*, 187 N. Y. 8.

In that case the Court of Appeals held that a stock transfer stamp tax of 2 cents per share irrespective of par value was unlawfully discriminatory. The statute when amended so as to fix the tax at 2 cents per $100 of par value was sustained by this Court over the objection that the tax was not based on actual values in *Hatch* v. *Reardon*, 204 U. S. 152, where Mr. Justice Holmes (p. 159) pointed out that equality in some cases had "to yield to practical considerations and usage".

The two cases cited exemplify with particular aptness the flexibility, and yet the strength, of the principle requiring equality in taxation. Where the inequality complained of was between shares of similar par but varying actual values, the "practical considerations" controlled: the requirement of a quick method of computation in the case of stock transfer tax stamps rendered the criterion of actual values impractical. But where the inequality complained of was between shares of different par values apparent on the face of the certificates, no necessity of convenience justified the discrimination. So, when non-par stock came into use practical considerations justified a stock transfer tax of 2 cents per share irrespective of actual values. But it is interesting to note that when Congress levied a stamp tax on original issues of capital stock, the actual values represented by non-par stock were taken, within reasonable limits, as the basis for the computation of the tax. In construing the Act of Congress to impose a tax measured by the actual value represented rather than the number of shares, Judge Soper said:

> "* * * When the nature of the two kinds of stock [par value and non-par] is considered, no obvious reason suggests itself for the employment of different methods in the calculation of the tax * * *. It was therefore reasonable that in fixing the taxation for the two classes of stock Congress should make the alleged value the basis of taxation in one case and the actual value the basis of taxation in the other."
>
> *Commercial Credit Co. v. Tait*, 2 F. (2d) 862; aff'd 7 F. (2d) 1022.

POINT II.

The attempted classification of foreign corporations according to the number of issued shares of non-par stock was not justified by reasons either of convenience or of usage.

Whatever may be the situation in other States, in New York it happens that there can be no argument from convenience for computing the "license fee" according to the number of shares of non-par stock rather than according to the actual or market value. One method is as convenient as the other. The explanation is that for the purposes of the annual "franchise tax" provided for in Article 9-A of the *Tax Law*, the computation of the minimum tax of one mill per dollar is based in the case of corporations with non-par stock on the "issued capital stock, at not less than its actual or market value, and not less than five dollars per share, as may be determined by the Tax Commission" (*Tax Law*, § 214). The information necessary for such computation is required to be disclosed in the annual report (*Tax Law*, § 211). Obviously, therefore, since every foreign corporation having non-par stock will have reported the actual and market value of that stock prior to the expiration of its first year of doing business in New York, the computation of the "license fee" can be made on the basis of such actual or market value as conveniently as upon the basis of the number of shares.

Nor does usage, any more than convenience, justify the substitution of "count for weight" in the computation of a tax of this character, that is to say, a tax or fee imposed by a state on a foreign corporation for the privilege of doing business and payable only once. As a matter of fact, there are four different methods of assessing such a charge, to wit:

In Alabama, Colorado, Georgia, Illinois, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Oklahoma, Pennsylvania, South Dakota, Texas, Wash-

ington, West Virginia (minimum valuation per share $25), Wisconsin (minimum valuation per share $10) and Wyoming, the tax is computed on the basis of the actual value of the non-par shares or the assets represented thereby or paid in thereon;

In Arizona, California, Connecticut, Delaware (or fixed by reciprocity), Kentucky, Maine, Maryland, Massachusetts, Nebraska, New Hampshire, New Jersey (or fixed by reciprocity), New Mexico, North Dakota, Oregon, Rhode Island and Vermont, there is a fee of a fixed amount not exceeding $250 (although in New Mexico foreign corporations having par value stock pay graduated fees up to $3,000!);

In the following jurisdictions the tax is based on the authorized capital stock, an arbitrary valuation being assigned to shares without par value, viz.:

Idaho, Missouri, North Carolina (maximum tax $250), South Carolina, Tennessee, Utah and Virginia (maximum tax $5,000) $100 per share;

Montana, $50;

Arkansas, $25 (issued stock);

Alaska, $1;

In Florida, Indiana, Nevada, New York and Ohio the tax is computed at so much per share on the number of shares.

Parker: Corporation Manual (30th ed.).

Of forty-nine jurisdictions, then, only fifteen use a method which fixes the tax according to the number of non-par shares without regard to their value, and of those fifteen all except Arkansas and New York base the tax on authorized and not on issued stock, a fact which furnishes an argument of convenience in support of the method (see discussion, *infra*, pp. 18-19).

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In Arizona, California, Connecticut, Delaware (when not exempt by reciprocity), Kentucky, Maine, Maryland, Massachusetts, Nebraska, New Hampshire, New Jersey (when not exempt by reciprocity), New Mexico, North Dakota, Oregon, Rhode Island and Vermont, there is a fee of a fixed amount not exceeding $250 (although in New Mexico foreign corporations having par value stock pay graduated fees up to $3,000!);

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Of forty-nine jurisdictions, then, only fifteen use a method which fixes the tax according to the number of non-par shares without regard to their value, and of those fifteen all except Nevada and New York base the tax on authorized and not on issued stock, a fact which furnishes an argument of convenience in support of the method (see discussion, *infra*, pp. 18-19).

This leaves New York standing alone with Nevada—and no complaint is likely to be made of the Nevada statute for the rate is only one-tenth of a mill per share!

POINT III.

In the case of foreign corporations having non-par stock there was no relation between the amount of the tax and the value of the privilege conferred by the State.

To support the classifications here attempted some basis must be found "reasonable or unreasonable, other than mere accident, whim or caprice. There must be some support of taste, policy, difference of situation or the like, some reason for it even if it is a poor one."

P. ex rel. Farrington v. *Mensching*, 187 N. Y. 8, at p. 18.

The appellants suggest as a reason the protection of domestic corporations. So far as discrimination in favor of domestic corporations is concerned, that is a valid reason (*Hanover Insurance Company* v. *Harding*, 272 U. S. 494). But the appellants do not show the necessity of levying a tax which is discriminatory as among various classes of foreign corporations in order to protect domestic corporations.

True, the State of New York charges its own corporations five cents per share for the privilege of authorizing non-par stock (*Tax Law*, § 180), but domestic corporations must pay that organization tax irrespective of the proportion of their assets that they actually employ in the State of New York and irrespective of the number of shares of authorized non-par stock that they actually issue. They pay for the privilege of having authorized stock and not for the privilege of employing assets in the State.

Were the "license fee" payable by foreign corporations of the same character as the "organization tax" payable by domestic corporations, the protection of domestic corporations would be a sufficient justification for the discrimination here complained of. But the two taxes are by their nature

dissimilar: The domestic corporation which files a certificate authorizing a number of shares of non-par stock, issuable at varying prices, is receiving a privilege which the State of its incorporation alone can grant. There are valid reasons for making the price of that privilege higher than the amount exacted for the privilege of authorizing par value stock. But the foreign corporation with non-par stock receives from the State of New York no different privileges from those granted to foreign corporations having par value stock. The protection of property and persons, the administration of justice, the regulation of public utilities and all of the other benefits accorded to inhabitants of the State of New York accrue in equal measure to both classes of foreign corporations. The discrimination effected by the organization tax on domestic corporations as between par value stock and non-par stock, and as between shares of non-par stock issued for varying considerations, is reasonable because of the peculiar character of the privilege granted; the like discrimination in the case of foreign corporations is not reasonable, because the only difference in the privileges granted to them by the State of New York is one measured by the respective amounts of assets employed by them in the State.

POINT IV.

The real basis of decision in *Air-Way Electric Appliance Corporation* v. *Day*, 266 U. S. 71, is controlling here.

The appellants attempt to distinguish the *Air-Way Case* on the ground that there

(1) interstate commerce was involved;

(2) the authorized amount of stock was the basis;

(3) the tax was a "franchise tax".

(1) It is submitted that, despite the language of the opinion, the Commerce Clause was no more involved in the *Air-Way Case* than in the present case.

To support this statement it is necessary to refer to the facts in the *Air-Way Case* and also in the case of *Hump Hairpin Co. v. Emmerson*, 258 U. S. 290. In each of those cases, as in the present case, a foreign corporation was engaged in manufacture of products which were sold by it throughout the United States pursuant to orders accepted only at the place of manufacture and completed by shipments direct from factory to dealers. All of the property, real and personal, of each of the three corporations was situated within the respective taxing state.*

In the *Hump Hairpin Case* the State of Illinois exacted a tax measured by the entire capital stock of the foreign corporation, although about 90% in gross amount of the sales had been made to customers outside of Illinois. This Court was of the opinion that while such sales constituted interstate commerce, the effect of the tax thereon was incidental, remote and unimportant.

In the *Air-Way Case* about 70% in gross amount of the sales were made to customers outside of Ohio, but this fact did not appear in the report first filed by the company and the taxing authorities computed the tax on the basis of the entire capital stock. The company then attempted to file an amended report showing the percentage of sales made to customers without the State. The State taxing authorities refused to accept the amended report but the statutory court which heard the injunction suit (*Air-Way Electric Appliance Corporation v. Archer*, 3 F. (2d) 669) decided that the com-

* In the *Air-Way Case* there are a few intimations in the record that goods manufactured in Ohio were located in warehouses without the State, but the affidavit of the treasurer of the company (transcript of record, p. 27) shows that all goods so stored had already been actually sold in sales accepted in Ohio and were merely awaiting the completion of the sale by payment.

pany was entitled to the benefit of an apportionment according to the formula:

$$\frac{\text{Ohio property} + \text{Ohio sales}}{\text{Total property} + \text{total sales}} \times \text{Authorized shares}$$

The court disapproved the ruling of the Attorney-General of Ohio that the business of operating a factory in Ohio may be measured by the volume of sales whether made in interstate commerce or not. Although recognizing that in all essential facts the case before him was the same as the *Hump Hairpin Case*, Judge Sater said (p. 671):

> "• • • In the instant case the amount assessed by the Commission upon interstate commerce is not remote, incidental and unimportant but on the contrary is a substantial sum levied directly upon the stock representing interstate business."

It is impossible to follow this reasoning unless Judge Sater had in mind the specific figures of the taxes assessed on the basis of the entire stock: in the *Hump Hairpin Case*, $6,045, and in the *Air-Way Case* $20,000. Yet, omitting intangibles, the assets of the two companies were closely similar: in the Illinois case, $416,629; in the Ohio case, $458,278. The gross sales were likewise close: in the Illinois case, $263,334; in the Ohio case, $250,594. The percentage of interstate business in the Illinois case, 90%, was substantially larger than in the Ohio case, 71%. In neither case does it appear what proportion of the gross interstate sales was allocable to manufacturing or other operations not essentially interstate commerce. Presumably Judge Sater considered a tax of $6,045 an unimportant burden on such portion of $237,520 as really represented interstate commerce, but $20,000 a substantial burden on the corresponding portion of $179,792.

This decision of the statutory court furnished the basis for a cross-appeal to this Court by the Ohio authorities, but the point raised in the cross-appeal was not passed on. Had the statute been sustained, this Court would have had to

allow the cross-appeal or overrule the *Hump Hairpin Case*. It is believed, however, that the Court is not disposed to depart from the principle of the *Hump Hairpin Case* as to corporate taxes measured by capital stock or the analogous principle as to corporate taxes measured by net income (*Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113; *Bass etc.* v. *Tax Commission*, 266 *id.* 271). In fact, those principles are followed generally in the taxing statutes and administrative practice of the States today. For example, in the annual report required from all corporations, domestic and foreign, doing business in New York, the amount of bills and accounts receivable arising from the sale of goods manufactured in New York whether or not made in interstate commerce are segregated to New York (R. p. 19).

Some language in the *Hump Hairpin Case* might be taken to mean that the gross amount of the sales made in interstate commerce in that case ($263,334) was so small compared with the total amount of property reported to be in Illinois ($5,540,755) that this Court believed the burden on interstate commerce to be unimportant. The tangible property, however, was only $416,629, the balance of the larger amount apparently being arbitrarily assigned as the "potential value" of patent rights, licenses, trade-marks, secret processes and good will. The ratio between the gross amount of sales in interstate commerce and the reported amount of property, was, however, of no relevance, for it was not the purpose of the Illinois legislature, any more than that of the General Assembly of Ohio, in the words of Judge Sater (3 F. (2d) at p. 671):

> "to include interstate business as a basis for the levy, but only as a factor in determining the proportion that should be paid upon strictly state business."

It is true that the formulæ used in Illinois and Ohio were somewhat different, the Illinois statute requiring the formula

$$\frac{\text{Illinois business}}{\text{Total business}} + \frac{\text{Illinois property}}{\text{Total property}} + 2 \times \text{Total par value of stock}$$

But in principle the situation in the two cases was identical.

If the failure of the Illinois authorities to apply the above formula was not sufficient in the opinion of this Court to burden interstate commerce, it was not because of any relation between the figures as to interstate sales and intrastate property but because *of the series of transactions beginning with the manufacture within the State and ending with the delivery to a customer without the State so large a proportion was intrastate business that the interstate element was reduced to the lowest terms, i. e., the gross amount of sales in interstate commerce did not really represent only interstate transactions.* If that is the correct explanation of the *Hump Hairpin Case* then there should have been no apportionment in the *Air-Way Case* and the Commerce Clause was not a true ground of decision. This is clear from the language of the opinion (266 U. S. at p. 82):

> "All plaintiff's business, intrastate and interstate, and all its property wherever located were represented by the 50,485 shares of stock outstanding. * * * The inevitable effect of the act is to tax and directly burden interstate commerce of foreign corporations permitted to do business in Ohio, and engaged in interstate commerce, wherever the number of shares authorized, subject to the charge of five cents each, exceeds the number of outstanding shares attributable to or represented by the corporation's property and business in that State. In this case, the fee fixed by the commission was based on nearly eight times the number of outstanding shares and that determined by the court on nearly six times that number. As some of the outstanding shares are represented by plaintiff's interstate business, the application of the rate to all the shares, or to a number greater than the total outstanding, necessarily amounts to a tax and direct burden upon all the property and business including the interstate commerce of the plaintiff."

It is difficult to see how the interstate business as distinguished from the property used therein or the good will attached thereto was represented by any of the outstanding shares. There could hardly have been any good will attached to the interstate business of Air-Way Electric Appliance

Corporation, for its operations showed a loss (transcript of record, p. 23). If in the *Hump Hairpin Case* the sales in interstate commerce amounting to 90% of the total were not represented by the outstanding shares, although 92% of the total property of the company consisted of intangibles including good will, then the outstanding shares of Air-Way Electric Appliance Corporation did not represent the sales made by it in interstate commerce; and if a tax based on the entire capital stock of Hump Hairpin Company without apportionment was not a direct burden on interstate commerce, then a tax based on the entire amount or a part of the capital stock of Air-Way Electric Appliance Corporation, whether authorized or issued and whether at an arbitrary rate or actual value, was not a direct burden on its interstate business.

That at least the Commerce Clause is not an important ground of decision in the *Air-Way Case* is suggested by the opinion of this Court in *Hanover Insurance Co.* v. *Harding*, *supra*, where the *Air-Way Case* is classified with the cases based on the Equality Clause and not with the cases based on the Commerce Clause (272 U. S., at p. 508).

(2) The use of authorized rather than issued stock as a basis for the computation of the tax was undoubtedly an important factor in the decision in the *Air-Way Case*, but in principle the use of the issued number of shares of non-par stock is open to the same objections as the use of the authorized number of shares of any kind. Had the Ohio statute based the tax on issued and not authorized shares, the opinion of the Court would have been applicable with no change in substance and little change in wording. This is shown by the following altered excerpt, from which the references by the Court to the number of authorized shares have been omitted and words referring to issued shares have been substituted, the substituted words being italicized and enclosed in brackets:

> "• • • The number of non-par value shares of the corporation is not an indication of, and does not purport to be a representation as to, the amount of its capital.

Each outstanding share represents merely an aliquot part of its assets. * * * Plainly the fee, to the extent that it is based on [*the number of issued non-par shares*] has no relation to what was paid in for the stock or to its value or to the amount of plaintiff's capital, its property or its business, intrastate in Ohio or interstate. The act in its practical operation does not require like fees for equal privileges held by foreign corporations in Ohio under the same circumstances. Unless, under the laws of the States where organized they chance * * * to issue the same number of non-par value shares, the annual franchise fees imposed on foreign corporations having the same amount of property and business, and exercising the same privileges in Ohio will not be the same; and the charge imposed on one may be many times that made against another. * * * compare two corporations organized in a sister State having the same number of [*issued*] non-par value shares, one having property and business of little value, all in Ohio, and the other having much more property and business in that State, and also much property and business in other States. The act would require the former to pay five cents per share on all its shares, but would require the latter to pay a fee based only on the proportion of its shares representing its property owned and used and business transacted in Ohio.

"It is clear that the mere number of [*issued*] non-par value shares is not a reasonable basis for the classification of foreign corporations for the purpose of determining the amount of such annual fees. Such a classification is not based on anything having relation to the purpose for which it is made. * * * The act has no tendency to produce equality; and it is of such a character that there is no reasonable presumption that substantial equality will result from its application. * * * The act violates the equal protection clause of the Fourteenth Amendment."

(3) It is also true that the tax involved in the *Air-Way Case* was a tax payable annually similar to the New York "franchise tax" and not a tax payable only once such as the New York "license fee". Whether this is a substantial ground of distinction is discussed below under Point VI (*infra*, p. 21).

POINT V.

The principle of *Roberts & Schaefer Co.* v. *Emmerson*, 271 U. S. 50, is not applicable to a tax based on the issued stock of foreign corporations and should not have been followed in the *Margay Oil* and *Gilliland Oil Cases*.

This Court is now committed to the doctrine that a tax on domestic corporations may be based on the number of authorized shares of non-par stock, irrespective of the amount paid thereon or the value of the assets represented thereby.

Roberts & Schaefer Co. v. *Emmerson, supra;*
Montgomery Ward & Co. v. *Emmerson*, 277 *id* 573.

Such discrimination is justified on two grounds; first, the peculiar nature of the privilege granted by the State; and, second, the practical inconvenience of assigning in advance a value per share to authorized shares which may be issued in the future at varying rates of consideration.

That the first ground does not apply to the case of a foreign corporation is apparent from the language of the Court in the *Roberts & Schaefer Case* referring to the *Air-Way Case:*

> "• • • The authority to issue its capital stock was a privilege conferred by another State and bore no relation to any franchise granted to it by the State of Ohio or to its business and property within that State. When authorized capital stock is taken as the basis of the tax, variations in the amount of the tax are obtained, according as the corporation has a large or small amount of unissued capital stock. This was held, in the *Air-Way Case* to be an unconstitutional discrimination, since it resulted in a tax larger than the tax imposed on other corporations with like privileges and like business and property within the State, but with a smaller capital authorized under the laws of the State of their creation."
>
> 271 U. S. 50, at p. 54.

The language quoted is equally applicable to distinguish a tax based on the issued number of shares of non-par stock of a foreign corporation from a tax on domestic corporations such as was before the Court in the *Roberts & Schaefer Case.*

The other ground of decision in the *Roberts & Schaefer Case,* namely, the difficulty of appraising unissued non-par stock is not applicable where the tax is measured by issued and not by authorized shares.

When, therefore, the Arkansas statute imposing a tax on foreign corporations based on the number of their issued shares of non-par stock taken at an arbitrary valuation of $25 per share came before this Court (*Margay Oil Corp.* v. *Applegate,* 273 U. S. 666; *Gilliland Oil Co.* v. *Arkansas,* 274 *id.* 717), the principles announced in the *Air-Way Case* should have been followed. If the ground of distinction announced in the *Roberts & Schaefer Case* as distinguishing that case from the *Air-Way Case* was valid then the two Arkansas cases should have been distinguished from the *Roberts & Schaefer Case* on the same ground. On the other hand, it is impossible to distinguish in principle the Arkansas cases from the *Air-Way Case.* The use of the issued number of shares of non-par stock as the basis of computation of a tax on foreign corporations is as discriminatory in effect as the use of the authorized number of shares of any kind, and the taxing State is no more concerned with the privilege of a foreign corporation to issue shares of non-par stock than with its privilege to authorize shares of any kind.

It is submitted, therefore, that the Court should reconsider the position taken in the Arkansas cases.

It is believed that the correct rule has been expressed by the Supreme Court of Illinois as follows:

> "Any system of taxation must have for its basis some standard of value. It may be the amount of business transacted, the amount invested in business, net profits or other standard capable of measurement in money. It is the province of the Legislature to determine the standard. If it is the amount of capital stock, the amount must be reducible in some way to terms of money, and

it must be fixed with some regard to value, whether par value, issue price, market value, or value determined in some other manner and not by an arbitrary valuation at a set figure, whether $100.00, $5.00, or $500.00. There is no universal or generally prevalent law or custom which establishes the value of shares of stock of no-par value at any certain figure, and a law of one state which enacts that for purpose of taxation the shares of stock of foreign corporations having no par value shall be regarded as of a definite, specific value, is arbitrary, discriminatory and denies due process of law and the equal protection of the law. The terms of the General Corporation Act which provide that in the event that the corporation has stock of no-par value, its shares for the purpose of fixing fees shall be considered to be of the par value of $100.00 per share are therefore discriminatory between foreign corporations having shares of stock of no-par value issued at different prices and in different amounts.

* * * * * *

"The number of shares into which the capital stock of foreign corporations may be divided is not a reasonable basis for classification of such corporations for the purpose of determining the amount either of the initial fee for a certificate of authority to do business in Illinois, or of the annual franchise tax, and, therefore, an arbitrary valuation of the capital stock of no-par value of such corporations at $100.00 a share, or any other denite amount a share, without reference to par value, sale price, market price, or any consideration other than number of shares, renders such classification discriminatory against corporations which have issued such stock at prices less than $100.00 a share and denies to them due process of law and the equal protection of the laws."

O'Gara Coal Co. v. *Emmerson*, 326 Ill. 18, 36, 47.

The decisions of State courts cited in the appellants' brief are not persuasive towards a different view. The decisions of the Supreme Courts of Arkansas and Missouri (*State* v. *Margay Oil Co.*, 167 Ark. 614; *State* v. *Pierce Petroleum Corp.*, 2 S. W. (2d) 790) appear to be based mainly on the fact that a similar method was provided for computing the

tax on domestic corporations. In *American Uniform Co.* v. *Commonwealth*, 257 Mass. 242, the tax was based on authorized not issued stock, so that the argument from convenience already referred to was present. In *Detroit Mortgage Corp.* v. *Secretary*, 211 Mich. 320, the fact that the State of incorporation of the foreign corporation provided for an arbitrary valuation of non-par stock appeared to influence the decision.

POINT VI.

The tax, even if it is the price of admission to the State, may be impugned under the Equality Clause of the Fourteenth Amendment.

The point chiefly relied on by the appellants, and the one which furnishes the main text of the discussion in Judge Morris' opinion below, is that payment of the "license fee" being a condition upon which the corporation was admitted to the State, the measure of its amount was within the discretion of the legislature.

While the appellants' brief contains some allusions to the "contract obligation" of the bankrupt, there can be no pretense that the bankrupt in fact agreed to pay the tax or assented to the method by which it was computed. Any consent relied on must be one raised by implication of law from the acts of the corporation in entering the State and applying for authority to do business, but it is now too late to contend that such an implied consent to any particular condition is not limited co-terminously with the power of the State to impose such condition *in invitum* (*Hanover Insurance Co.* v. *Harding*, 272 U. S. 494, 517).

The first premise of the appellants' argument is that the power of a State to affix conditions to the entrance of foreign corporations is unqualified. It is true that, aside from cases where the Commerce Clause or the jurisdiction of the federal

courts was concerned, very few of the decisions of this Court have sustained the right of a foreign corporation to question a statute which was on the books when the corporation entered the State. It is also true that the extension of the "doctrine of unconstitutional conditions" to include the Equality Clause involves a logical dilemma, for a foreign corporation, bartering at the State's border, is not a "person within its jurisdiction" and, therefore, is not yet vested with the right to equal protection of its laws. Nevertheless, the Equality Clause has been held to be included in the doctrine mentioned.

Power Mfg. Co. v. *Saunders*, 274 U. S. 490;
Quaker City Cab Co. v. *Pennsylvania*, 277 *id.* 389.

These cases reflect a realistic attitude which solves the dilemma: the entrance into the State, with or without authority, constitutes the foreign corporation a "person within its jurisdiction", and it is the *prospective* constitutional right waiver of which is nullified by the doctrine referred to. So, if the corporation enters without authority and even without the purpose of engaging in the transaction of its ordinary business, but solely to enforce its rights in the State's tribunals, it becomes a "person" entitled to the protection of the Equality Clause.

Kentucky Finance Corporation v. *Paramount Auto Exchange Corporation*, 262 U. S. 544.

The contention may be made, however, that in each of the three cases last cited compliance with the statute in question was not a condition of admission into the State, and that, therefore, the cases are not authorities against the existence of unqualified power to impose such conditions. The appellants appear to find such a distinction suggested in *Hanover Insurance Co.* v. *Harding*, 272 U. S. 494. But the facts of that case do not support the construction contended for. The question for decision was whether the assessment at full value and taxation of the net receipts of

foreign insurance companies was an unlawful discrimination in favor of domestic companies which paid no tax on net receipts and paid taxes on personal property assessed at only 30% of full value. There was no question but that payment of the tax was a condition of renewal of the annual license to do business in the State. The Chief Justice, however, in delivering the opinion of the Court, declared it necessary first to determine whether the tax was in its nature a payment for the privilege of being admitted, in which case there could be no discrimination as between foreign and domestic companies, because of the difference in the privileges granted, or a contribution to the general tax burden borne by all of the inhabitants of the State, in which case such inequality would not be justified. The Court did not decide, nor does the opinion imply, that inequality *as between foreign companies* in the imposition of a tax for the privilege of admission was within the discretion of the State. In fact, in discussing the limitations on the power of the State in fixing the conditions of admission the Chief Justice cited the *Air-Way Case* in which the inequality was between foreign corporations.

There appears to be no more reason for holding a State empowered to affix conditions of admission which are unreasonably discriminatory as between the applicants for admission than to affix conditions, whether of initial admission or of permission to remain, which, if complied with, will deprive the corporation of its property without due process of law, or burden its interstate commerce, or deprive it of recourse to the federal courts. Compliance with any of the conditions last mentioned might be asked as the *price* of admitting the foreign corporation to equality with domestic corporations under the doctrine of the *Hanover Insurance Case*, and yet, as suggested in that case, the foreign corporation might enter or continue to remain and refuse to pay the price. If, then, standing at the border a foreign corporation can say to the State: "We will enter, but after we *shall have* acquired property within and without

your jurisdiction we will disregard your statute taxing us on the basis of our entire capital stock without apportionment," or "we will enter, but after we *shall have* engaged in interstate commerce we will disregard your statute burdening such commerce," or "we will enter, but after we *shall be* an inhabitant of your State we will disregard your prohibition of our recourse to the federal courts,"—then with equal assurance it should be able to say: "We will enter, but after we *shall become* a person within your jurisdiction we will disregard your statute unreasonably discriminating against us in favor of other foreign corporations." In all of the cases supposed, the constitutional right, waiver of which the State is not empowered to exact as the price of admission, does not vest in the corporation until it has entered the State. Obviously, therefore, it is not necessary to establish that the right existed before the corporation crossed the border. That would be necessary only if the State exacted present compliance, *e. g.*, a payment of money, at the border —a case which is hardly likely to occur. Whether a State has unqualified power to exact compliance even with that kind of condition, it is not necessary to consider, for certainly no such present compliance *at the border* was exacted here. Only after the first year was the "license fee" payable.

The appellants maintain, however, as the second premise of their argument, that notwithstanding postponement of the due date payment of the "license fee" was a condition of the character which is beyond constitutional restraint. The word "condition" is used in this connection in various senses. That payment of the "license fee" was a condition precedent to, *i. e.*, the price of, admission of the foreign corporation to *equality with domestic corporations*—the sense in which the term was used in the *Hanover Insurance Case*—must be conceded, despite the intimation to the contrary in Judge Morris' opinion below. That such payment was not a condition precedent to the grant of authority to do business is clear from a reading of *Stock Corporation Law*, §§ 110-111 and the decisions of the New York Court of Appeals

(*Parmele Co.* v. *Haas*, 171 N. Y. 579; *Wood & Selick* v. *Ball*, 190 *id.* 217). That it was not, in strict sense, a condition precedent to entry is admitted in Judge Lehman's opinion (*P. ex rel. D. W. Griffith, Inc.* v. *Loughman*, 249 N. Y. 369).

It is submitted that whether or not payment of the "license fee" was a condition, precedent or subsequent, in any of the senses referred to by the Chief Justice or Judge Morris or Judge Lehman is not material here. Every tax on a foreign corporation, whether payable only once, or once every ten years, or every year, if non-payment would lead to ouster, is a condition of admission or of permission to remain. If compliance with that condition is also the price of admission to equality with domestic corporations, then discrimination in favor of such corporations cannot be complained of. But whether the tax is such an admission fee, or a contribution to the general tax burden, in either case it must not involve burdening interstate commerce, depriving the foreign corporation of property without due process, or denying equality with other persons similarly situated and receiving like privileges.

That this Court finds no distinction between "license fee" and "franchise tax," in the sense contended for by the appellants, at least where the Commerce Clause and the Due Process Clause are concerned, is shown by the decision at this term in *Cudahy Packing Co.* v. *Hinkle* (No. 278, decided February 18, 1929, Adv. Op. 49 Sup. Ct. Rep. 204). There a "filing fee", payable only once, and a "license fee", payable annually, were alike held invalid because based on the total capital stock of the foreign corporation without apportionment. In the opinion of Dietrich, *C. J.*, sitting on the statutory court (24 F. (2d) 124), the "filing fee" was clearly valid on the ground that it was

> "a single charge for the privilege of entering the State and there exercising its corporate functions in the transaction of interstate business, for an indefinite period."

Yet no distinction as between the two kinds of tax was recognized by this Court.

It is, therefore, not possible to accept the dictum of Judge Lehman, (249 N. Y. at p. 374), that

> "the power of the State to impose upon a foreign corporation a license fee or tax as a condition precedent of its entry into the State is, from its nature, less subject to constitutional limitations than the power to impose a franchise tax as payment or compensation for the privilege of continuing to do business here."

On the contrary, except as concerns equality between domestic and foreign corporations, constitutional limitations on the two kinds of tax are the same.

This being granted, the balance of Judge Lehman's opinion in the *Griffith Case* is not persuasive. He fails to explain why the objections raised in the *Air-Way Case* to a tax based on authorized non-par stock at five cents per share are not equally applicable to a tax based on issued non-par stock at six cents per share. He fails to explain why the reasons announced in the *Roberts & Schaefer Case* for sustaining a tax based on the authorized non-par stock of a domestic corporation apply to a tax based on the issued non-par stock of a foreign corporation. It is to be noted that none of his language on the subject of constitutionality was necessary to the decision of the case.

POINT VII.

The attitude of this Court toward the arbitrary taxation of foreign corporations having non-par stock is of national importance.

On January 1, 1928, the aggregate market value of non-par stock listed on the New York Stock Exchange was nearly $17,000,000,000 (See bulletin of National Industrial Conference Board in Appendix.)

Of the entire number of returns filed by corporations having non-par stock for the purposes of the federal capital stock tax in 1925, 20% were made by Delaware corporations. (See bulletin, *supra*.) Of the entire number of corporations formed in Delaware 46% are authorized to issue non-par stock. (Information obtained from State School Tax Department.) It is reasonable to suppose that most of these corporations will do business in other States.

In the course of developing the principles which safeguard foreign corporations from the exactions of the States, this Court has reflected the change in ideas generally which has been brought about by the constantly growing importance of nation-wide business conducted in the corporate form. It well be a step backward if these principles are not applied in aid of, and not to discourage, the use of so widely prevalent and admirable an instrument as non-par stock.

While in the instant case the arbitrary nature of the impost is sufficiently apparent—being about 5⅓% of the total value of the assets in the State—an even more striking instance of the inequality produced by statutes of the character in question is about to be heard by this Court (*International Shoe Co.* v. *Shartel*, Oct. Term, 1928, No. 579). There non-par stock of a foreign corporation having the actual value of $46,000,000 has been arbitrarily valued by the State of Missouri at $376,000,000, making a difference in the annual tax of over $77,000!

Such inequalities will increase in number and extent, unless this Court reconsiders the position taken in the Arkansas cases and once more announces the principles set forth in the *Air-Way Case*.

POINT VIII.

The judgment appealed from should be modified so as to direct the reduction of the State's claim to $725 and interest.

If the provision of § 181 of the *Tax Law* as to non-par stock is held to be invalid, the statute as it was before being amended to include such provision (L. 1921, c. 705, § 3) remains in force. The bankrupt was, then, in the same position as the relator in *P. ex rel. Terminal and Town Taxi Corporation* v. *Walsh*, 202 App. Div. 651, where § 181 before amendment was held to impose on a foreign corporation having non-par stock a "license fee" based on the actual capital *i. e.*, assets employed within the State. In the case of the bankrupt the amount paid in on its stock was $580,000. If this amount is taken to be the capital employed in the State the tax at the rate of ⅛ of 1% is $725. A modification of the judgment appealed from, so as to reduce the claim of the State of New York to $725 with interest and to allow the claim as so reduced, is consented to by appellees.

Respectfully submitted,

RALPH MONTGOMERY ARKUSH,
JAMES I. BOYCE,
Counsel for Appellees.

Appendix.

TAX LAW

LAWS OF NEW YORK, 1909, c. 62

Entitled "An Act in relation to taxation, constituting chapter sixty of the consolidated laws."

* * * * * * *

§ 181. License tax on foreign corporations. As used in this section, the term "corporation includes a joint stock company or association and any business conducted by a trustee or trustees wherein interest or ownership is evidenced by certificate or other written instrument. Every foreign corporation, except banking corporations, fire, marine, casualty and life insurance companies, co-operative fraternal insurance companies, and building and loan associations, doing business in this state, shall pay for the use of the state, a license fee of one-eighth of one per centum for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state, to be computed upon the basis of the capital stock employed by it within this state, during the first year of carrying on its business in this state; which first payment shall not be less than ten dollars; and if in any year thereafter any such corporation shall employ more than eight thousand dollars of its capital stock within this state on which a license fee has not been paid then a license fee at the rate of one-eighth of one per centum shall be due and payable upon any such increase. The measure of the amount of capital stock employed in this state shall be such a portion of the issued capital stock as the gross assets employed in any business within this state bears to the gross assets wherever employed in business. On the issued capital stock of any corporation issuing shares without designated monetary value such corporation shall pay for the use of the state a license fee of six cents on each such share

employed in this state, as hereinbefore provided. For purposes of taxation, the capital of a corporation invested in the stock of another corporation shall be deemed to be assets located where the physical property represented by such stock is located. The amount of capital upon which such license fees shall be paid shall be fixed by the state tax commission, which shall have the same authority to examine the books and records in this state of such foreign corporations, and the employees thereof as it has in the case of domestic corporations, and the state commission shall have the same power to issue a warrant for the collection of such license fees, as now exists with regard to domestic corporations. No action shall be maintained or recovery had in any of the courts in this state by such foreign corporation after thirteen months from the time of beginning such business within the state, without obtaining a receipt for the payment of the license fee upon the capital stock employed by it within this state during the first year of carrying on its business in this state.

[As amended L. 1910, c. 340 § 1; L. 1915, c. 317 § 3; L. 1917, c. 490 § 1; L. 1921, c. 705 § 3; L. 1922, c. 375; L. 1924, c. 332 § 1]

* * * * * * *

§ 197. Payment of tax and penalties. A tax or fee imposed by section one hundred and eighty-one of this chapter shall be due and payable immediately after the close of the first year of carrying on business in this state. * * *

[As amended L. 1924, c. 332 § 10]

* * * * * * *

§ 209. Franchise tax on corporations based on net income. For the privilege of exercising its franchise in this state in a corporate or organized capacity every domestic corporation, and for the privilege of doing business in this state, every foreign corporation, except corporations specified in the next section, shall annually pay in advance for the year beginning November first next succeeding the first day of July in each and every year an annual franchise tax, to be computed by the tax commission upon the basis of its entire

net income, as defined in subdivision three of section two hundred and eight of the tax law, for its fiscal or the calendar year next preceding, as hereinafter provided, * * *.

[As amended by L. 1924, c. 329 § 2.]

* * * * * * *

§ 211. Reports of corporations to tax commission. Every corporation taxable under this article as well as foreign corporations having officers, agents or representatives within the state shall annually on or before July first, or within thirty days after the making of its report of entire net income to the United States treasury department for any fiscal or calendar year, preceding said first day of July, transmit to the tax commission a report in the form prescribed by the tax commission, specifying:

[As amended by L. 1920, c. 640 § 3.]

1. The name and location of the principal place of business of such corporation, the state under the laws of which organized, and the date thereof; the amount of its issued capital stock and the kind of business transacted. Any corporation not organized under the laws of any state within the United States shall state the facts in relation to its entire net income as though organized under the laws of this state.

[As amended by L. 1919, c. 628 § 4.]

2. The amount of its entire net income for its preceding fiscal or the preceding calendar year as provided by subdivision three of section two hundred and eight of the tax law, except as provided in subdivision one of this section.

[As amended by L. 1924, c. 329 § 3.]

3. The average monthly value for the fiscal or calendar year of its real property and tangible personal property in each city, village or portion of a town outside of a village within the state, and the average monthly value of all its real property and tangible personal property wherever located.

4. The average monthly value for the fiscal or calendar year of bills and accounts receivable arising from (*a*) personal property sold by the corporation from merchandise manufactured by it within this state; (*b*) personal property owned by the corporation and not manufactured by it within this state but sold by it or its agents and located within the state at the time of the receipt of the order; (*c*) the purchase or sale of, or trading in, goods, wares or merchandise not located at any place at which the corporation conducted a permanent or continuous business without the state, and where the bills and accounts receivable arose from orders received or accepted by any officer or agent, or at any place of business, in this state; and (*d*) services performed by any officer, agent or representative of the corporation connected with, sent from or reporting, either directly or indirectly, to any officer located in this state or at any office located, owned, rented or occupied in this state. Also the average total monthly value for the fiscal or calendar year of bills and accounts receivable arising from the manufacture by it of personal property or the purchase or sale of, or trading in, personal property, or from services performed by the corporation, its officers or agents, excluding those arising in any way from advances or loans.

[As amended by L. 1919, c. 628 § 4; L. 1920, c. 640 § 3.]

* * * * * * *

7. Such other facts as the tax commission may require for the purpose of making any computation required by this article, or for the purpose of comparison with former reports to determine whether or not such reports were erroneous or fraudulent.

[As amended by L. 1920, c. 640 § 3.]

8. Any corporation taxable hereunder upon its entire net income may omit from its report the statements required by subdivisions four and five by incorporating in its report a consent to be taxed upon its entire net income. Corpo-

rations having no net income shall, however, complete the segregation of assets in every case.

[As amended by L. 1919, c. 628 § 4.]

* * * * * * *

§214. Computation of tax. If the entire business of the corporation be transacted within the state, the tax imposed by this article, if imposed upon the entire net income, shall be based upon the entire net income of such corporation for such fiscal or calendar year as defined in section two hundred and eight of this chapter, subject, however, to any correction thereof for fraud, evasion or error, as ascertained by the state tax commission. If the entire business of such corporation be not transacted within the state, the tax imposed by this article shall be based upon a proportion of such entire net income, to be determined in accordance with the following rules: The proportion of the entire net income of the corporation upon which the tax under this article shall be based, shall be such portion of the entire net income as the aggregate of

1. The average monthly value of the real property and tangible personal property within the state.

2. The average monthly value of bills and accounts receivable arising from (*a*) personal property sold by the corporation from merchandise manufactured by it within the state; (*b*) personal property owned by the corporation and not manufactured by it within this state but sold by it or its agents and located within the state at the time of the receipt of the order; (*c*) the purchase or sale of, or trading in, goods, wares or merchandise not located at any place at which the corporation conducted a permanent or continuous business without the state, and where the bills and accounts receivable arose from orders received or accepted by any officer or agent, or at any place of business, in this state; and (*d*) services performed by any officer, agent or representative of the corporation connected with, sent from, or reporting, either directly or indirectly, to any officer located in this state or at any office located, owned, rented or occupied in this state.

3. The proportion of the average value of the stocks of other corporations owned by the corporation, allocated to the state as provided by this section, bears to the aggregate of

4. The average monthly value of all the real property and tangible personal property of the corporation, wherever located.

5. The average total monthly value for the fiscal or calendar year of bills and accounts receivable arising from (*a*) personal property sold by the corporation from merchandise manufactured by it within and without this state; and (*b*) the purchase, or sale of, or trading in, personal property, or from services performed by the corporation, its officers or agents, excluding those arising in any way from advances or loans.

6. The average total value of stocks of other corporations owned by the corporation.

* * * * * * *

Real property and tangible personal property shall be taken at its actual value where located. The value of share stock of another corporation owned by a corporation liable hereunder shall for purposes of allocation of assets be apportioned in and out of the state in accordance with the value of the physical property in and out of the state representing such share stock.

It is further provided that every domestic corporation exercising its franchise in this state and every foreign corporation doing business in this state, other than those exempted by section two hundred and ten of this chapter, shall be subject to a minimum tax of not less than ten dollars and not less than one mill upon each dollar of such a part of its issued capital stock, at its face value, as the amount of its gross assets employed by it in its business in this state bears to its gross assets wherever employed by it in its business. But if such a corporation has stock without par value, then

the base of the tax, with relation to such stock, shall be such a portion of such issued capital stock, at not less than its actual or market value, and not less than five dollars per share, as may be determined by the tax commission, as its gross assets employed in its business in this state bear to the entire gross assets employed in its business.

If such a corporation is subject to a tax at the rate of one mill, and it maintains no regular place of business outside this state, except a statutory office, it shall be taxed upon its entire issued capital stock as herein provided.

[As amended by L. 1921, c. 705 § 4.]

STOCK CORPORATION LAW

LAWS OF NEW YORK 1923, c. 787

Entitled "An Act relating to stock corporations, constituting chapter fifty-nine of the consolidated laws."

* * * * * * *

§ 110. Certificate of authority; change of name. 1. No foreign stock corporation other than a moneyed corporation shall do business in this state without having first procured from the secretary of state a certificate that it has complied with all the requirements of law to authorize it to do business in this state and that the business of the corporation to be carried on in this state is such as may be lawfully carried on by a corporation created under the laws of this state, for such or similar business, or if more than one kind of business, by two or more corporations so incorporated for such kinds of business respectively. The secretary of state shall issue such certificate to any such corporation so complying. No such foreign corporation doing business in this state shall maintain any action in this state upon any contract made by it in this state, unless prior to the making of such contract it shall have procured such certificate. This prohibition shall also apply to any assignee of such foreign corporation and to any person claiming under such assignee or such foreign corporation or under either of them.

[Formerly Sec. 15 of *General Corporation Laws.*]

§ 111. Proof to be filed; designation of attorney; service of process. 1. Before granting such certificate of authority the secretary of state shall require such foreign corporation to file in his office a sworn copy in the English language of its charter or certificate of incorporation and a statement in its corporate name signed and acknowledged by its president, or a vice-president, or its secretary, treasurer, managing director or attorney in fact, concisely setting forth the business which it proposes to carry on within the state and its proposed principal place of business within the state and the post-office address thereof and designating the secretary of state as its agent upon whom all process in any action or proceeding against such corporation may be served within the state. * * * Such designation shall continue in full force and effect until the filing of a certificate of surrender of authority pursuant to this article.

[Formerly Sec. 16 of *General Corporation Laws.*]

NATIONAL INDUSTRIAL CONFERENCE BOARD, INC.
247 PARK AVENUE, NEW YORK, N. Y.

AUGUST 1, 1928.

Rapid increase in the use of no-par stock in the financing of corporations in the United States is disclosed by an analysis of the extent of such issues, prepared by the National Industrial Conference Board, 247 Park Avenue, New York. While there is no means of ascertaining the total amount of no-par stock outstanding since 1925, the immense growth of this method of financing in recent years is reflected in the fact that, while the "fair value" of all outstanding no-par stock in 1925 is estimated by the Conference Board as less than $7,000,000,000, the market value of no-par issues listed on the New York Exchange alone at the beginning of 1928 amounted to nearly $17,000,000,000.

This latter figure in part reflects a considerable increase in market value as well as in actual number of shares issued, but an analysis of corporation financing during the past six years indicates that no-par value issues are becoming increasingly popular, particularly with big business concerns. Although the first law permitting no-par issues was enacted in 1912, in New York, little if any effort has been made to discover the total amount of no-par stock outstanding. On the basis of capital stock tax data, however, the Conference Board finds that by 1922, a total of 6,763 companies or nearly two per cent of all corporations in the United States, had issued no-par shares, while in 1925 a total of 17,543, or nearly five per cent of all corporations had issued no-par stock, the total "fair value" of which amounted to approximately $6,900,000,000.

Like data are not available for later years because the capital stock tax was discontinued in 1925, but the listings on the New York Stock Exchange, representing the bulk of all important issues, reflect still more rapid growth of no-par stock issues during the past four years. In 1925, 213, or 23 per cent of a total of 926 issues listed on that exchange, were no-par issues, representing in market value $5,284,000,000 or 19.5 per cent or less than one-fifth of the total market value of $27,070,000,000 of all listed issues. By 1928, the number of no-par issues had grown to 399, representing 36.4 per cent of all issues listed, with a market value of $16,850,000,000 which is 33.9 per cent or more than one-third of the total market value of all listed stock issues.

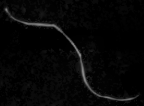
While these figures disclose the increase of no-par stock outstanding in proportion to the outstanding total of securities, they do not fully reflect the important rôle played by this form of stock issues in the new year by year financing during the past few years. During 1926, when the net gain of stock listings over 1925 was 117, as many as 90 issues or more than 75 per cent were no-par issues. In both 1927 and 1928, the net gain in the number of stock issues listed over the preceding year was greater for the no-par issues than for the total of all issues.

No-par stock issues appear to be most popular among industrial, service and finance corporations, but are found hardly at all in the field of railroad financing. Leaving out railroad stock issues from the total number of issues listed on the New York Exchange as of January 1, 1928, the Board finds that nearly 43 per cent of all outstanding non-railroad stock issues were of the no-par variety.

While corporations with no-par stock issues operate in practically all states, the proportion of all returns made to the Internal Revenue Bureau is greatest in Delaware, where such corporations accounted for one-fifth of all returns in 1925. Rhode Island, Massachusetts, Maryland, Ohio, New York and the District of Columbia rise considerably above the average.

In the following table is shown the increasing proportion of no-par stock issues listed on the New York Stock Exchange during the past four years:

Jan 1.	All Issues	No-par Issues	Per cent of all
1925	926	213	23.0
1926	1,043	303	29.1
1927	1,081	355	32.8
1928	1,097	399	36.4



SUPREME COURT OF THE UNITED STATES.

No. 601.—October Term, 1928.

The People of the State of New York, Appellants, *vs.* Gamble Latrobe, Jr., James P. Knowles, and William S. Erichs, Trustees, etc.	Appeal from the United States Circuit Court of Appeals for the Third Circuit.

[May 13, 1929.]

Mr. Justice Stone delivered the opinion of the Court.

This is an appeal under § 240 of the Judicial Code from a judgment of the Court of Appeals for the Third Circuit affirming, on the opinion of the court below, 26 F. (2d) 713, an order of the District Court for Delaware expunging the claim in bankruptcy of appellant, the State of New York, for unpaid taxes assessed by it against the bankrupt corporation.

Section 181, Article 9, of the Tax Law of New York, c. 62, Laws of 1909, as amended, imposes on every foreign corporation doing business in that state a tax computed upon the basis of the capital stock employed by it within the state during the first year it does business there; the amount of its stock so employed being that proportion of its total issued capital stock which its gross assets employed within the state bear to its gross assets wherever employed. In the case of stock having a par value, the tax is fixed at 1/8 of 1% of the par value of its stock so employed; for stock of no par value the fee is 6 cents per share. The tax, denominated a "license fee", is paid but once, purports to be imposed on the corporation "for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state" and the obligation to pay it is made a prerequisite to obtaining a certificate of authority from the state and to the continuance of business there. *People ex rel. Griffith v. Loughman*, 249 N. Y. 369. But the foreign corporation is permitted to transact business and make valid contracts within the

state prior to payment of the tax, which of necessity cannot be computed or paid until after the first year has elapsed. The tax is evidently the complement of the organization fee, computed in like fashion on the authorized capital stock of domestic corporations by Chapter 143 of the Laws of 1886. See *People ex rel Elliott-Fischer Co.* v. *Sohmer*, 148 App. Div. 514, aff'd. 206 N. Y. 634.

The bankrupt is a Delaware corporation whose authorized capital stock consists of 250,000 shares without par value, all of which has been issued at an average price of $2.32 per share. It commenced doing business in New York in November, 1924, and its total assets were used in its business in that state during the following year. The value of its tangible assets are alleged to have been but $280,000, or about $1.12 per share, and its intangible property to have been of no value. A tax of $15,000, computed at 6 cents per share, was assessed against it, and is the basis of the present claim.

The rejection of the claim by the referee was upheld by the district court on the sole ground that the tax on the bankrupt's non-par stock at the fixed rate of 6 cents per share, without regard to its true value or the amount paid into the corporation upon its issue, infringed the equal protection clause of the Fourteenth Amendment. The court thought that, as the tax could not be regarded as a true admission fee imposed as a condition of entrance into the state and the corporation was thus in a position to invoke the equal protection clause, see *Hanover Ins. Co.* v. *Harding*, 272 U. S. 494, 510, the invalidity of the taxing statute was established by the decision of this Court in *Air-Way Electric Appliance Corp.* v. *Day*, 266 U. S. 71, 83, since foreign corporations having the same amount of business and property both within and without the state, but with a different number of issued non-par shares, might be required to pay a tax differing from each other and from other foreign corporations with par value stock having like property within and without the state. The Court of Appeals of New York has since reached the opposite conclusion both as to the nature of the tax and its constitutionality. *People ex rel. Griffith* v. *Loughman*, *supra*.

For present purposes we need not determine whether the tax may be sustained because imposed as a condition of entrance into the state, for, assuming that the bankrupt corporation was within

the state and thus entitled to equal protection, *Hanover Ins. Co.* v. *Harding, supra, Southern Ry. Co.* v. *Greene,* 216 U. S. 400, 417, we do not deem the decision in the *Air-Way* case controlling, nor the tax so unreasonable or discriminatory as to deprive the bankrupt of any constitutional immunity.

The question presented in the *Air-Way* case was whether a state franchise tax imposed on a foreign corporation, based upon its total authorized non-par shares, only a small part of which had been issued, was forbidden. In holding that the tax infringed the equal protection clause, the Court was careful to point out that it was a tax computed upon the number of authorized shares of such a corporation, whether or not subscribed for or issued, and so had no relation to the value of the privilege exercised by the foreign corporation within the state and was not a reasonable measure of the tax imposed on such a privilege. And in *Roberts & Schaefer Co.* v. *Emmerson,* 271 U. S. 50, in upholding a franchise tax similar to that here involved upon a domestic corporation having non-par shares, whose entire authorized stock had been issued, this Court, in speaking of the decision in the *Air-Way* case, said (p. 54):

"While one factor in the computation of the tax was properly the proportion of the corporation's business done and property owned within the State, the other factor was the amount of its authorized capital stock, only a part of which had actually been issued. The authority to issue its capital stock was a privilege conferred by another State and bore no relation to any franchise granted to it by the State of Ohio or to its business and property within that State. When authorized capital stock is taken as the basis of the tax, variations in the amount of the tax are obtained, according as the corporation has a large or small amount of unissued capital stock. This was held, in the Air-Way case, to be an unconstitutional discrimination, since it resulted in a tax larger than the tax imposed on other corporations with like privileges and like business and property within the State, but with a smaller capital authorized under the laws of the State of their creation."

But the computation of the present tax is not, as in the *Air-Way* case, based upon the mere authority of the corporation to issue stock, a privilege conferred by another state and not fully exercised. Instead it is calculated on the number of shares of stock actually issued and used by the corporation in carrying on its business within the state. There is no complaint of discrimination between foreign

and domestic corporations and no attempt to tax property outside the state since the tax is apportioned to the property used within it. See *International Shoe Co.* v. *Shartel*, No. 579, October Term, 1928, *post*, p. —. So we come to different questions from any presented in the *Air-Way* case: whether issued capital stock of foreign corporations may be made the basis of a franchise or license tax at a flat rate per share when apportioned to the property and business of the corporation within the state, and whether the taxing act may discriminate by placing in one class corporations having par value stock and in another corporations having stock without par value.

1. It is said that the tax computed on the number of non-par shares at a flat rate may bear little relation to the property and business of the corporation within the state and consequently corporations having like property and business within the state, but with a different non-par capitalization, may be required to pay a different tax. But this is equally true of corporations having par value stock, even though full value be paid in on its issue. Par value and actual value of issued stock are not synonymous and there is often a wide disparity between them. Par value has long been a familiar basis of computing a franchise tax upon foreign corporations, and when otherwise unobjectionable has been repeatedly upheld by this Court. *See St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350; *Hump Hairpin Co.* v. *Emmerson*, 258 U. S. 290; *Cheney Brothers Co.* v. *Massachusetts*, 246 U. S. 147.

We have likewise sustained a state franchise tax on foreign corportations, measured by a fixed percentage of its non-par stock valued, as required by the statute, at $25 per share, and apportioned to the property and business of the corporation within the state. *Marpay Oil Corporation* v. *Applegate*, 273 U. S. 666; aff'g 167 Ark. 614; *Gilliland Oil Co.* v. *Arkansas*, 274 U. S. 717, aff'g 171 Ark. 415.

The kind and number of shares with which a foreign corporation is permitted to carry on its business within the state is a part of the privilege which the state extends to it and is a proper element to be taken into account in fixing a tax on the privilege. It may be assumed that if the doing of business with a greater number of non-par shares is not deemed by the taxpayer to be a valuable privilege, it will reduce the number of shares as the

statute permits. A state which has adopted a permissible scheme of franchise tax for domestic corporations, based on capital stock, *Roberts & Schaefer Co.* v. *Emmerson, supra,* has a legitimate interest in imposing a like burden on foreign corporations which it permits to carry on business there, and we can perceive no constitutional objection to its protecting that interest by such a tax where, as here, it is limited to shares actually issued, is not assailed as confiscatory, does not reach either directly or indirectly property beyond the state and does not discriminate between foreign and domestic corporations, or between foreign corporations of like organization and property.

There is nothing in the Constitution which requires a state to adopt the best possible system of taxation. *Southwestern Oil Company* v. *Texas,* 217 U. S. 114, 126; *Delaware Railroad Tax Cases,* 18 Wall 206, 231. Although permissible, a franchise tax need not be based solely on the amount of business done or property owned within the state. It may be rested on the nature of the business. *Southwestern Oil Company* v. *Texas, supra; Quong Wing* v. *Kirkendall,* 223 U. S. 59; *American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89; *Williams* v. *Fears,* 179 U. S. 270, 275; see *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540, 562, or the particular form in which it is carried on, see *Home Insurance Co.* v. *New York,* 134 U. S. 594, 606, so long as it bears some real and reasonable relation to the privilege granted or to the protection of the interests of the state. See *Roberts & Schaefer Co.* v. *Emmerson, supra,* at p. 57.

We think that the measurement of such a tax upon a foreign corporation at a flat rate upon its corporate stock, either par or non-par, used within the state, is likewise reasonably related to the privilege granted by the state and to the protection of its own interest in the maintenance of its similar policy of taxation with respect to domestic corporations and so does not infringe any constitutional immunity.

2. Nor is such a tax to be deemed a denial of equal protection because a different measure or method of computing the tax is applied to corporations having non-par stock from that applied to corporations having stock of par value. In *Roberts & Schaefer Co.* v. *Emmerson, supra,* at p. 56, it was pointed out that there were such differences between par and non-par shares, both in their legal

incidents and their actual use, and such practical difficulties in measuring a tax by the latter except by assigning to them an artificial or fixed value or assessing them at a flat rate, as to justify the classification for purposes of a franchise tax on domestic corporations. It was accordingly held that such a tax may be based on the par value of shares of corporations having par value stock, and on a fixed value assigned to non-par shares, regardless of their actual value or the varying amounts paid in upon them.

But these differences between the two classes of stock, and especially the difference in the rights of creditors of the two classes of corporations,[1] equally justify classification and discrimination between them in fixing a franchise tax based on corporate stock of foreign corporations. The inequalities in the tax result from a classification founded upon real differences, hence the resulting discrimination is not arbitrary or prohibited by the Fourteenth Amendment.

Reversed.

Mr. Justice McREYNOLDS and Mr. Justice BUTLER concur in the result.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[1]The use of non-par stock which may be issued at any price deemed wise, at the particular time, by the directors or stockholders, see New York Stock Corporation Law, § 69; Missouri Stock Corporation Law, § 5, or in many cases for property without fixing a price, and which has no fixed or designated amount dedicated to capital or surplus respectively, makes difficult the determination of the true capital of the corporation which it is required to keep intact and the amount which any particular stockholder is bound to pay for his stock. See Bevis, Problems of Non-Par Stock, 25 Columbia Law Rev. 43; Ballantine, Corporations (1927) § 217; cf. Johnson v. Louisville Trust Co., 293 Fed. 857. Resulting difficulties in the enforcement by creditors of the liability of directors for improper diversion of capital or of stockholders for unpaid subscriptions, have been often urged as arguments against any use of non-par stock. 1 Cook, Corporations (1923) § 45d; Bonbright, Dangers of Shares without Par Value, 24 Columbia Law Rev. 449; Ripley, Railroads: Finance & Organization (1915) 91; Cook, Stock without Par Value, 19 Michigan Law Rev. 583.

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Supreme Court of the United States

THE PEOPLE OF THE STATE OF NEW YORK,
Appellants,

AGAINST

GAMBLE LATROBE, JR., JAMES B. KNOWLES and WILLIAM S. ERICHS, trustees in bankruptcy of THERMIODYNE RADIO CORPORATION,
Appellees-Petitioners.

October Term,
A. D. 1928.
No. 601.

PETITION FOR REHEARING.

Come now the above-named appellees-petitioners and present this, their petition for a rehearing of the above-entitled cause, and, in support thereof, respectfully show:

I. The ground of distinction found by the court between this case and the *Air-way Case* is a novel one which was not considered by the courts below or raised in the argument before this court.

The opinion suggests that the basis of the tax in the *Air-way Case* was the mere authority to issue stock, a privilege not fully exercised, but in the present case was the number of shares actually used in carrying on business within the State. This distinction implies that a corporation "uses" its shares of stock in carrying on its business or, in other words, that there is such a relation between its

capital structure and its business that the form of the one is a proper measure of the other.

That there is such a relation is assumed by the court without reference to authority, legal or economic, and without further discussion.

This novel point of view was not considered by the courts below, was not argued in this court and is believed never to have been expressed in any previous opinion of this court. If the details of the internal structure or capitalization of foreign corporations having no relation to the amount of its property or business are to be made the basis of franchise taxes by the states within which such corporations desire to transact business, a new chapter in the taxation of foreign corporations has opened.

As a matter of fact, there is no relation whatever between the transaction of the corporate business and the form of the capital structure. The number of shares of stock into which the capital is divided fixes the rights of stockholders as among themselves and with respect to the property, earnings and management of the corporation, but does not affect its dealings with third persons or any of its acts as an entity.

Counsel desire an opportunity to show to the court that the distinction suggested by the opinion between this case and the *Air-way Case* is illusory.

II. The decisions cited in the opinion as sustaining franchise taxes based on par value treated such par value as representing property.

In *St. Louis Southwestern Railway Company* v. *Arkansas*, 235 U. S. 350, the tax was based "upon the proportion of the outstanding capital stock of the corporation represented by property owned and used in business transacted in this State." Sustaining the tax, Mr. Justice Pitney said (p. 363):

> "We therefore accept the construction * * * that it imposes an annual franchise tax upon the right * * *

to exercise corporate powers within the State, the amount of the tax being fixed solely by reference to *the property of the corporation that is within the State* and used in business transacted within the State," * * * [italics ours]."

(p. 365):

"Applying these principles, we have no difficulty in sustaining the tax in question as a legitimate imposition upon a foreign corporation with respect to its exercise of the privilege of transacting intrastate business in corporate form, the tax being based *upon the amount and value of its property within the State.* * * * the Act provides machinery for ascertaining *the market value of the entire capital stock* and striking a proportion between the value of the property owned and used by the corporation in the State and that owned and used by it outside of the State [italics ours]."

In *Hump Hairpin Co.* v. *Emmerson*, 258 U. S. 290, the tax was based on the amount of the authorized capital stock represented by property located and business transacted within the State. In sustaining the tax, Mr. Justice Clarke stated (p. 295) that:

"if computed on the *property admitted to have been in use in the State* it would be but slightly less than the tax collected."

Cheney Brothers Co. v. *Massachusetts*, 246 U. S. 147, followed *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68, which is no longer law.

Cudahy Packing Co. v. *Hinkle*, 278 U. S. 460.

The reason that par value is a proper basis for computing the franchise tax on foreign corporations is that there is *some* relation between par value and actual assets.

P. ex rel. Farrington v. *Mensching*, 187 N. Y. 8.

III. The court failed to give effect to the doctrine of the *Farrington Case*.

The opinion of Judge Vann in *P. ex rel. Farrington* v. *Mensching, supra*, is a landmark in the law of arbitrary taxation. It was the basis of the decision in *P. ex rel. Terminal and Town Taxi Corporation* v. *Walsh*, 202 App. Div. 651, which, as is shown below, was the occasion for the enactment of the statutory provision here in question. Those two New York decisions were the basis of the taxpayer's argument in this court in the *Air-way Case*. There is no reason to suppose that had not this court decided the *Margay Oil* and *Gilliland Oil Cases* as it did, the Court of Appeals would not have followed the *Farrington Case* in expressing its opinion as to the constitutionality of the statute here in question in *P. ex rel. D. W. Griffith, Inc.* v. *Loughman*, 249 N. Y. 369.

Even if a foreign corporation can be said to "use" its issued shares in carrying on business within a state, the doctrine of the *Farrington Case* forbids taxing the privilege of carrying on such business by reference to the number of shares into which its capital happens to be divided. Certainly if the priivlege of transferring in the State of New York shares having different par values cannot under the Federal Constitution be taxed at a flat rate per share, then the privilege of carrying on business in the State of New York cannot be taxed at a flat rate per issued non-par share.

Judge Vann said (187 N. Y. 20):

> "• • • there is no plausible or possible reason why one hundred acres in a single field should not pay the same tax as one hundred acres of equal value in ten fields."

So, there is no plausible or possible reason why a foreign corporation employing $1,000 represented by 10 shares should not pay the same tax as another foreign corporation employing $1,000 represented by 100 shares.

> "• • • If the corporations have equal assets and are equally successful, the two lots of shares are exactly the same thing."

IV. The suggestion in the opinion, that a state extends to a foreign corporation any privilege with regard to the number of shares into which its capital stock is divided, is novel, was not considered by the courts below or raised in the argument before this court.

Here, again, the court refers to no authority, legal or economic, and enters into no further discussion.

Counsel desire an opportunity to show to the court that the assumption so made is baseless and that a foreign corporation receives no privilege whatsoever from any state, except the state of its incorporation, with regard to the number of shares into which its capital stock is divided.

Even if it is admitted that the carrying on of business "with non-par stock" is part of the privilege extended by a state to foreign corporations, the number of shares into which such stock is divided is not a reasonable basis for measuring such privilege. The state grants to the farmer the privilege of owning a farm, but the number of fields into which the farm is divided is not a reasonable basis for measuring this privilege.

When the court assumes that if the doing of business with a greater number of non-par shares is not deemed by the taxpayer to be a valuable privilege it will reduce the number of shares, it echoes the words of the statutory court in the *Air-way Case* (279 Fed. 878 at p. 889):

> "• • • If, when taxpaying time comes, its officers and stockholders find its authorized capital excessive, production of a needless financial burden, and harmful to them in their competition with others engaged in like manufacturing (and there are some thus engaged), there is no apparent impediment obstructing their reduction of such capital."

V. In considering the scheme of taxation adopted by the State of New York this court has disregarded the treatment of non-par stock for the purpose of the annual franchise tax.

The opinion refers to the scheme adopted by the State of New York for domestic corporations as being permissible under the doctrine of *Roberts & Schaefer Co. v. Emmerson*, 271 U. S. 50. That was a case of an annual franchise tax on domestic corporations; but the State of New York has not adopted any consistent scheme with respect to annual or initial taxes based on non-par stock, either of domestic or foreign corporations.

Under the provisions of Article 9-A of the *Tax Law* of this State, non-par stock of both domestic and foreign corporations is treated at its actual or market value but not less than $5 per share (*Tax Law*, §214). On the other hand, in the case of the organization tax on domestic corporations, an arbitrary rate is essential, for the tax is on authorized stock and it is impracticable to levy such a tax in any other manner. Far from being part of a consistent scheme of taxation of domestic and foreign corporations, the provision here in question is an anomaly and inconsistent with the other provisions of the *Tax Law*, as is shown by the history of the amendments of that law.

When domestic corporations were first authorized to have stock without par value in 1912, no particular provision was made for the computation of the license fee on foreign corporations having non-par stock. Article 9-A of the *Tax Law* providing for the annual franchise tax was enacted in 1917 and originally provided that non-par stock should be valued at the amount paid in. This latter provision was amended in 1920 (L. 1920, c. 640), so as to provide that non-par shares should be valued at $100 per share. No similar provision, however, was made with regard to the initial license fee. A foreign corporation having non-par stock representing about $8.55 per share was assessed for

both license fee and annual franchise tax on the basis of $100 per share. In a proceeding to revise this assessment, the Appellate Division for the Third Department held:

(1) That there being no authority under §181 for the assumption that non-par stock should be valued at $100 per share, the assessment of license fee must be based on the actual assets employed within the State;

(2) That the 1920 amendment valuing non-par stock at $100 per share for the annual franchise tax was unconstitutional.

P. ex rel. Terminal and Town Taxi Corporation v. *Walsh*, 202 App. Div. 651.

After the rendition of this decision, which was not appealed, the Legislature amended both §181 and §214 so as to contain substantially the provisions before this court (L. 1921, c. 705, §§3, 4).

It is apparent that the Legislature, instead of adopting a consistent scheme of treatment of non-par stock for the purposes of both annual franchise tax and initial license fee, went no further than was thought to be required by the actual holding in the *Terminal and Town Taxi Case*.

It is difficult to see what interest the State of New York has in maintaining a policy of taxing foreign corporations on the basis of six cents per share of their *issued* stock to the extent of the proportion allocated to the State of New York, in order to protect domestic corporations which are required to pay five cents per share on all their *authorized* non-par stock, whether issued or unissued and irrespective of what proportion of their assets are employed within the State.

VI. The suggestion in the opinion, that discrimination as between non-par stock and par value stock of foreign corporations may be based on a difference between the rights of creditors of the two classes of corporations, overlooks the fact that in some cases the discrimination may be in favor of the non-par corporations and against the par value corporations.

It is believed that the criticisms of non-par stock suggested by various writers referred to in the footnote of the opinion—whatever the validity of such criticisms—were not even remotely connected with the legislation here in question. The State of New York and the leaders of its Bar were the pioneers in the advocacy of this kind of stock. Among the distinguished New Yorkers whose recommendations were followed by the New York Legislature were Edward M. Shepard, Francis Lynde Stetson, F. W. Stevens, Victor Morawetz, Charles E. Hughes, Elihu Root, Louis Marshall and Frederick Strauss.

Wildman & Powell: Capital Stock without Par Value, pp. 15-32.

The defects alleged by Professors Bonbright and Berle, with regard to the liability of directors or of stockholders, existed as well in the New York as in other statutes. In fact the Delaware statute has now been amended so as to provide for the precise demarcation of capital from surplus (*Revised Code of Delaware*, c. 65, Sec. 14, as amended).

When the State of New York itself provides for the issue of non-par stock by its own corporations, having all of the defects which have been urged against that kind of stock generally, it can hardly be said that the existence of those defects is the basis of a discrimination made by the State of New York between foreign corporations having non-par stock and par value stock.

But if it were true that the Legislature, on account of the existence of such alleged defects in non-par stock, intended to discriminate against all corporations having that kind of stock, it signally failed to do so, because the statute here in question only discriminates against foreign corporations having non-par stock *representing less than $48 per share of paid in value.* A foreign corporation having 10,000 issued shares of the par value of $100 each and employing all of its assets in the State of New York is required to pay a license fee of 1/8 of 1%, *i. e.* $1,250; whereas a foreign corporation having 10,000 non-par shares issued for $100 per share is required to pay six cents per share, *i. e.* $600.

Surely the alleged differences in the rights of creditors of corporations having the two different classes of stock cannot be made the basis of a discrimination which operates in either of two directions according to the amount paid in on the non-par stock.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the judgment of the Circuit Court of Appeals for the Third Circuit be, upon further consideration, affirmed.

Respectfully submitted,

RALPH MONTGOMERY ARKUSH,
JAMES I. BOYCE,
Counsel for Appellees-Petitioners.

Certificate of Counsel.

I, RALPH MONTGOMERY ARKUSH, counsel for the above-named appellees-petitioners, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

RALPH MONTGOMERY ARKUSH,
Counsel for Appellees-Petitioners.

SUPREME COURT OF THE UNITED STATES.

No. 601.—October Term, 1928.

The People of the State of New York, Appellants, *vs.* Gamble Latrobe, Jr., James P. Knowles, and William S. Erichs, Trustees, etc.	Appeal from the United States Circuit Court of Appeals for the Third Circuit.

[May 13, 1929.]

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This is an appeal under § 240 of the Judicial Code from a judgment of the Court of Appeals for the Third Circuit affirming, on the opinion of the court below, 26 F. (2d) 713, an order of the District Court for Delaware expunging the claim in bankruptcy of appellant, the State of New York, for unpaid taxes assessed by it against the bankrupt corporation.

Section 181, Article 9, of the Tax Law of New York, c. 62, Laws of 1909, as amended, imposes on every foreign corporation doing business in that state a tax computed upon the basis of the capital stock employed by it within the state during the first year it does business there; the amount of its stock so employed being that proportion of its total issued capital stock which its gross assets employed within the state bear to its gross assets wherever employed. In the case of stock having a par value, the tax is fixed at 1/8 of 1% of the par value of its stock so employed; for stock of no par value the fee is 6 cents per share. The tax, denominated a "license fee", is paid but once, purports to be imposed on the corporation "for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state" and the obligation to pay it is made a prerequisite to obtaining a certificate of authority from the state and to the continuance of business there. *People ex rel. Griffith v. Loughman*, 249 N. Y. 369. But the foreign corporation is permitted to transact business and make valid contracts within the

state prior to payment of the tax, which of necessity cannot be computed or paid until after the first year has elapsed. The tax is evidently the complement of the organization fee, computed in like fashion on the authorized capital stock of domestic corporations by Chapter 143 of the Laws of 1886. See *People ex rel Elliott-Fischer Co.* v. *Sohmer*, 148 App. Div. 514, aff'd. 206 N. Y. 634.

The bankrupt is a Delaware corporation whose authorized capital stock consists of 250,000 shares without par value, all of which has been issued at an average price of $2.32 per share. It commenced doing business in New York in November, 1924, and its total assets were used in its business in that state during the following year. The value of its tangible assets are alleged to have been but $280,000, or about $1.12 per share, and its intangible property to have been of no value. A tax of $15,000, computed at 6 cents per share, was assessed against it, and is the basis of the present claim.

The rejection of the claim by the referee was upheld by the district court on the sole ground that the tax on the bankrupt's non-par stock at the fixed rate of 6 cents per share, without regard to its true value or the amount paid into the corporation upon its issue, infringed the equal protection clause of the Fourteenth Amendment. The court thought that, as the tax could not be regarded as a true admission fee imposed as a condition of entrance into the state and the corporation was thus in a position to invoke the equal protection clause, see *Hanover Ins. Co.* v. *Harding*, 272 U. S. 494, 510, the invalidity of the taxing statute was established by the decision of this Court in *Air-Way Electric Appliance Corp.* v. *Day*, 266 U. S. 71, 83, since foreign corporations having the same amount of business and property both within and without the state, but with a different number of issued non-par shares, might be required to pay a tax differing from each other and from other foreign corporations with par value stock having like property within and without the state. The Court of Appeals of New York has since reached the opposite conclusion both as to the nature of the tax and its constitutionality. *People ex rel. Griffith* v. *Loughman*, *supra*.

For present purposes we need not determine whether the tax may be sustained because imposed as a condition of entrance into the state, for, assuming that the bankrupt corporation was within

the state and thus entitled to equal protection, *Hanover Ins. Co.* v. *Harding, supra, Southern Ry. Co.* v. *Greene*, 216 U. S. 400, 417, we do not deem the decision in the *Air-Way* case controlling, nor the tax so unreasonable or discriminatory as to deprive the bankrupt of any constitutional immunity.

The question presented in the *Air-Way* case was whether a state franchise tax imposed on a foreign corporation, based upon its total authorized non-par shares, only a small part of which had been issued, was forbidden. In holding that the tax infringed the equal protection clause, the Court was careful to point out that it was a tax computed upon the number of authorized shares of such a corporation, whether or not subscribed for or issued, and so had no relation to the value of the privilege exercised by the foreign corporation within the state and was not a reasonable measure of the tax imposed on such a privilege. And in *Roberts & Schaefer Co.* v. *Emmerson*, 271 U. S. 50, in upholding a franchise tax similar to that here involved upon a domestic corporation having non-par shares, whose entire authorized stock had been issued, this Court, in speaking of the decision in the *Air-Way* case, said (p. 54):

"While one factor in the computation of the tax was properly the proportion of the corporation's business done and property owned within the State, the other factor was the amount of its authorized capital stock, only a part of which had actually been issued. The authority to issue its capital stock was a privilege conferred by another State and bore no relation to any franchise granted to it by the State of Ohio or to its business and property within that State. When authorized capital stock is taken as the basis of the tax, variations in the amount of the tax are obtained, according as the corporation has a large or small amount of unissued capital stock. This was held, in the Air-Way case, to be an unconstitutional discrimination, since it resulted in a tax larger than the tax imposed on other corporations with like privileges and like business and property within the State, but with a smaller capital authorized under the laws of the State of their creation."

But the computation of the present tax is not, as in the *Air-Way* case, based upon the mere authority of the corporation to issue stock, a privilege conferred by another state and not fully exercised. Instead it is calculated on the number of shares of stock actually issued and used by the corporation in carrying on its business within the state. There is no complaint of discrimination between foreign

and domestic corporations and no attempt to tax property outside the state since the tax is apportioned to the property used within it. See *International Shoe Co.* v. *Shartel*, No. 579, October Term, 1928, *post*, p. —. So we come to different questions from any presented in the *Air-Way* case: whether issued capital stock of foreign corporations may be made the basis of a franchise or license tax at a flat rate per share when apportioned to the property and business of the corporation within the state, and whether the taxing act may discriminate by placing in one class corporations having par value stock and in another corporations having stock without par value.

1. It is said that the tax computed on the number of non-par shares at a flat rate may bear little relation to the property and business of the corporation within the state and consequently corporations having like property and business within the state, but with a different non-par capitalization, may be required to pay a different tax. But this is equally true of corporations having par value stock, even though full value be paid in on its issue. Par value and actual value of issued stock are not synonymous and there is often a wide disparity between them. Par value has long been a familiar basis of computing a franchise tax upon foreign corporations, and when otherwise unobjectionable has been repeatedly upheld by this Court. See *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350; *Hump Hairpin Co.* v. *Emmerson*, 258 U. S. 290; *Cheney Brothers Co.* v. *Massachusetts*, 246 U. S. 147.

We have likewise sustained a state franchise tax on foreign corportations, measured by a fixed percentage of its non-par stock valued, as required by the statute, at $25 per share, and apportioned to the property and business of the corporation within the state. *Margay Oil Corporation* v. *Applegate*, 273 U. S. 666; aff'g 167 Ark. 614; *Gilliland Oil Co.* v. *Arkansas*, 274 U. S. 717, aff'g 171 Ark. 415.

The kind and number of shares with which a foreign corporation is permitted to carry on its business within the state is a part of the privilege which the state extends to it and is a proper element to be taken into account in fixing a tax on the privilege. It may be assumed that if the doing of business with a greater number of non-par shares is not deemed by the taxpayer to be a valuable privilege, it will reduce the number of shares as the

statute permits. A state which has adopted a permissible scheme of franchise tax for domestic corporations, based on capital stock, *Roberts & Schaefer Co.* v. *Emmerson, supra,* has a legitimate interest in imposing a like burden on foreign corporations which it permits to carry on business there, and we can perceive no constitutional objection to its protecting that interest by such a tax where, as here, it is limited to shares actually issued, is not assailed as confiscatory, does not reach either directly or indirectly property beyond the state and does not discriminate between foreign and domestic corporations, or between foreign corporations of like organization and property.

There is nothing in the Constitution which requires a state to adopt the best possible system of taxation. *Southwestern Oil Company* v. *Texas,* 217 U. S. 114, 126; *Delaware Railroad Tax Cases,* 18 Wall 206, 231. Although permissible, a franchise tax need not be based solely on the amount of business done or property owned within the state. It may be rested on the nature of the business. *Southwestern Oil Company* v. *Texas, supra; Quong Wing* v. *Kirkendall,* 223 U. S. 59; *American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89; *Williams* v. *Fears,* 179 U. S. 270, 275; see *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540, 562, or the particular form in which it is carried on, see *Home Insurance Co.* v. *New York,* 134 U. S. 594, 606, so long as it bears some real and reasonable relation to the privilege granted or to the protection of the interests of the state. See *Roberts & Schaefer Co.* v. *Emmerson, supra,* at p. 57.

We think that the measurement of such a tax upon a foreign corporation at a flat rate upon its corporate stock, either par or non-par, used within the state, is likewise reasonably related to the privilege granted by the state and to the protection of its own interest in the maintenance of its similar policy of taxation with respect to domestic corporations and so does not infringe any constitutional immunity.

2. Nor is such a tax to be deemed a denial of equal protection because a different measure or method of computing the tax is applied to corporations having non-par stock from that applied to corporations having stock of par value. In *Roberts & Schaefer Co.* v. *Emmerson, supra,* at p. 56, it was pointed out that there were such differences between par and non-par shares, both in their legal

incidents and their actual use, and such practical difficulties in measuring a tax by the latter except by assigning to them an artificial or fixed value or assessing them at a flat rate, as to justify the classification for purposes of a franchise tax on domestic corporations. It was accordingly held that such a tax may be based on the par value of shares of corporations having par value stock, and on a fixed value assigned to non-par shares, regardless of their actual value or the varying amounts paid in upon them.

But these differences between the two classes of stock, and especially the difference in the rights of creditors of the two classes of corporations,[1] equally justify classification and discrimination between them in fixing a franchise tax based on corporate stock of foreign corporations. The inequalities in the tax result from a classification founded upon real differences, hence the resulting discrimination is not arbitrary or prohibited by the Fourteenth Amendment.

Reversed.

Mr. Justice McREYNOLDS and Mr. Justice BUTLER concur in the result.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[1]The use of non-par stock which may be issued at any price deemed wise, at the particular time, by the directors or stockholders, see New York Stock Corporation Law, § 69; Missouri Stock Corporation Law, § 5, or in many cases for property without fixing a price, and which has no fixed or designated amount dedicated to capital or surplus respectively, makes difficult the determination of the true capital of the corporation which it is required to keep intact and the amount which any particular stockholder is bound to pay for his stock. See Berle, Problems of Non-Par Stock, 25 Columbia Law Rev. 43; Ballantine, Corporations (1927) § 217; cf. Johnson v. Louisville Trust Co., 293 Fed. 857. Resulting difficulties in the enforcement by creditors of the liability of directors for improper diversion of capital or of stockholders for unpaid subscriptions, have been often urged as arguments against any use of non-par stock. 1 Cook, Corporations (1923) § 45d; Bonbright, Dangers of Shares without Par Value, 24 Columbia Law Rev. 449; Ripley, Railroads-Finance & Organization (1915) 91; Cook, Stock without Par Value, 19 Michigan Law Rev. 583.